No. 99-478-CSY Title: Charles C. Apprendi, Jr., Petitioner
v.
New Jersey

Docketed: September 21, 1999 Court: Supreme Court of New Jersey

Entry	Date	Proceedings and Orders
	Sep 20 1999	Petition for writ of certiorari filed. (Response due October 21, 1999)
	Oct 20 1999	Brief of respondent New Jersey in opposition filed.
	Nov 3 1999	DISTRIBUTED. November 24, 1999
	Nov 29 1999	Petition GRANTED. SET FOR ARGUMENT March 28, 2000. **********
	Jan 13 2000	Joint appendix filed.
	Jan 13 2000	Brief of petitioner Charles C. Apprendi filed.
	Jan 13 2000	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jan 13 2000	Brief amicus curiae of Rutherford Institute filed.
	Jan 26 2000	CIRCULATED.
	Jan 31 2000	Record filed.
	Feb 14 2000	Brief amicus curiae of United States filed.
	Feb 14 2000	Brief of respondent New Jersey filed.
	Feb 14 2000	Brief amicus curiae of Anti-Defamation League filed.
	Feb 17 2000	Brief amici curiae of respondents Brudnick Center on Violence and Conflict, et al. filed.
	Feb 24 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 3 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Mar 6 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 16 2000	Reply brief of petitioner Charles Apprendi filed.
	Mar 28 2000	ARGUED.

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No. _____

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

PETITION FOR WRIT OF CERTIORARI

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
Phone: (856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
Phone: (856) 225-6181

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether this Court should decline the invitation of the New Jersey Supreme Court to decide whether New Jersey's hate crime law, *N.J.S.A.* 2C:44-3e., unconstitutionally provides for an extended term of imprisonment increasing the maximum possible penalty by ten years, based on proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt, and denies the defendant rights to notice by indictment and trial by jury.

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OPINIONS BELOW

The opinion of the New Jersey Supreme Court is recorded at 159 N.J. 7, 731 A. 2d 485 (1999) and is attached hereto in the Appendix at 1a to 67a. The opinion of the Superior Court of New Jersey, Appellate Division is reported at 304 N.J. Super. 147, 698 A. 2d 1265 (App. Div. 1997) and is attached hereto in Appendix at 68a to 94a. The opinion of Superior Court, Law Division, Judge Rushton Ridgway was oral, not written, and this transcript is attached in the Appendix hereto at 95a to 163a.

JURISDICTION

The petitioner, Charles C. Apprendi, Jr., respectfully prays that a writ of *certiorari* be issued to review the June 24, 1999 judgment and opinion of the Supreme Court of New Jersey affirming the decision of the Superior Court of New Jersey, Appellate Division, affirming his conviction and sentence under a hate crime law, *N.J.S.A.* 2C:44-3e., originally entered by Superior Court of New Jersey, Law Division, Judge Rushton Ridgway.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Amend. XIV, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

N.J.S.A. 2C:44-3e.:

> . . . [T]he court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S. 2C:12-1a., N.J.S. 2C:33-4 or a violation of N.J.S. 2C:14-2 or 2C:14-3 if the grounds for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e . . . .
>
> e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

STATEMENT OF THE CASE

This case raises in the most direct and uncluttered form the constitutional questions discussed, but left unanswered, in *Jones v. United States*, ___U.S.___119 S. Ct. 1215, 143 L.Ed. 2d 311 (1999): the constitutional aspects of the right to a jury determination of critical facts in a criminal case. More precisely, the case asks whether a state legislature can require that a judge decide, by a preponderance of the evidence, a defendant's mental state, which can dramatically increase his maximum sentence, thereby depriving the defendant of his or her Sixth Amendment guarantee of governmental proof beyond a reasonable doubt to a jury. The New Jersey statute in question here, N.J.S.A. 2C:44-3e., expressly gives to the judge, not the jury, to be decided not beyond a reasonable

doubt, but by a preponderance of the evidence, the purpose with which a defendant acted. That factor doubles the variable maximum sentence, from a possible maximum of ten years to a maximum sentence of 20 years. Moreover, that factor is uniquely the kind of question which common law juries have decided for at least the past five centuries, the defendant's mental state and purpose in acting.

The factual setting demonstrates the critical importance of the *Jones* case. The petitioner, Charles Apprendi, was arrested for shooting into his neighbor's house. Mr. Apprendi ultimately pleaded guilty to possession of a firearm for an unlawful purpose, and to unlawful possession of a prohibited weapon, but preserved his right to challenge the constitutionality of the New Jersey statute here involved, contending that it violated the Sixth Amendment to the United States Constitution.

Having reserved that objection, Mr. Apprendi appeared at a plenary hearing, held before the Hon. Rushton Ridgway, to determine his state of mind at the time of the shooting. That hearing, at which Judge Ridgway was to determine the issue by a preponderance of the evidence, began by focusing on the interrogation of the defendant only one hour after the incident.

On December 22, 1994 the petitioner was arrested in his home in Vineland, New Jersey for the shooting of his neighbor's house. The shooting occurred at approximately 2:04 a.m. At approximately 3:05 a.m. on December 22, 1994 defendant confessed to Vineland Police that he had fired approximately four or five rounds from a .22 caliber rifle into the house. After more than three hours

of interrogation on December 22, 1994, at approximately 6:04 a.m., the petitioner again was questioned by the police. No written or recorded oral statement was given by the defendant, but an officer did testify at a plenary hearing before the trial court that Mr. Apprendi " . . . told me he fired shots at the home because there were black people living there." 175a.

The nature and extent of the three-hour interrogation of Mr. Apprendi is significant in two respects. First, the police department had espoused the theory that the shooting of the house was racially motivated long before the petitioner was interrogated. Specifically, there had been previous criminal mischief activities against the residence.

The second reason why the interrogation of the petitioner was significant pertains to the defendant's psychological infirmities, which were explored in a September 5, 1995 plenary hearing, at which time Judge Ridgway heard testimony from Clinical and Forensic Psychologist Gerald Cooke, character witnesses and Defendant Charles Apprendi. Dr. Cooke opined that the motive for the shooting constituted an impulsive destructive disorder brought about when the front door of the house caught his attention because it was purple with a big pane of glass. There was no racially prejudicial intent behind this shooting. 233a-234a.

Dr. Cooke testified that when Mr. Apprendi was interrogated by the police, he was still intoxicated with drugs and alcohol. 211a. Dr. Cooke opined that the petitioner suffers from an obsessive compulsive disorder,

which includes anxiety, gastrointestinal symptoms, kleptomania, loss of control of anger impulses, depression, and drug and alcohol abuse. 216a-217a.

At the plenary hearing Dr. Cooke testified that his clinical examination of the defendant revealed he also suffered from a psychlosymic condition, which is similar to that of a bipolar psychological condition, where "[T]he individual's moods go from being excited and hypomanic and elated to being depressed and lethargic." 217a. On direct examination Dr. Cooke testified that in the fall and winter of 1994 the defendant's psychological disorders and the drug and alcohol produced a synergistic effect, where "[Y]ou've got the combination with an individual who is anxious and over-controlled, but who is disinhibited under the effect of those drugs and alcohol. And you've got an individual who when he becomes emotional also shows interference. So all three factors really combine into fear of judgment and reasoning and impulse control." 218a.

With respect to the police interrogation of Mr. Apprendi, Dr. Cooke testified that:

> Here we have a very anxious man. One who feels very vulnerable. One who feels very inadequate. And one who would say or do just about anything to get out of a frightening anxiety-arousing situation.
>
> Q. Even tell a lie?
>
> A. Tell somebody a lie if it was what he thought that person wanted to hear in order to stop the interrogation and let him out of the situation. . . . I'm only saying that he has the

> kind of personality of an individual who would do that to get out of this kind of situation. 219a.

The purpose of Dr. Cooke's testimony was to reveal to the Court that Defendant Apprendi had psychological infirmities, which contributed significantly to both the shooting incidents and his confession.

After hearing the evidence of the defendant's mental state, Judge Ridgway declared:

> And the Court also takes into consideration that, as I said before, I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias, would not have manifested itself, except for the psychiatric problem that he has. 160a.

This statement makes unclear whether Judge Ridgway would have found the petitioner guilty of the hate crime of possession of a gun had the standard of proof been beyond a reasonable doubt. What is clear, however, is that Judge Ridgway was deciding the issue of the defendant's *mens rea*, informed by testimony on the impact of a psychiatric condition, an issue (and testimony) universally left for juries in determining the culpability of a defendant.

REASONS FOR GRANTING THE WRIT

N.J.S.A. 2C:44-3e. UNCONSTITUTIONALLY ALTERS THE CRIME TO ONE CARRYING AN INCREASED MAXIMUM SENTENCE BASED ON PROOF BY A PREPONDERANCE OF THE EVIDENCE, RATHER THAN PROOF BEYOND A REASONABLE DOUBT, AND DENIES THE DEFENDANT RIGHTS TO NOTICE BY INDICTMENT AND TRIAL BY JURY.

As this Court is well aware, *Jones, supra,* decided some monumental issues regarding the allocation of fact-finding between judge and jury. Nevertheless, the precise constitutional parameters of *Jones* were left unclear because it was unnecessary to resolve that question. The instant case raises two possible interpretations of *Jones,* each of which would be sufficient to decide this case, but each of which would both solidify and clarify the constitutional basis of *Jones*:

1. any fact which increases the maximum sentence of a defendant must be decided by a jury, beyond a reasonable doubt;

2. any fact or judgment, however characterized or labeled, which goes to the defendant's mental state, must be decided by a jury, beyond a reasonable doubt.

Whichever path this Court chooses to resolve the question presented will guide many lower courts, both state and federal, in the numerous cases which are now bubbling to the surface. As Justice O'Hern put it cogently in this very decision: "Any disposition that we make is necessarily tentative in the sense that the final word on this subject will have to come from the United States

Supreme Court." *State of New Jersey v. Charles Apprendi,* 159 N.J. 7, 21, 731 A. 2d 485, 493 (1999) 17a.

> An issue that is surfacing with increasing frequency in criminal cases is whether a given portion of a statute constitutes an element of an offense or, instead, is a sentencing provision. The answer determines whether the factual determinations for which the provision calls are to be made by the fact-finder or the sentencer, and whether the reasonable doubt standard approved must be applied. 67 *U.S.L.W.* 3289, Vol. 67, No. 16 (Nov. 3, 1998)

This petition aptly presents this question for final resolution by the United States Supreme Court. With certain exceptions, the New Jersey hate crime law permits enhanced sentencing in any case in which "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *N.J.S.A.* 2C:44-3e.

We now explore each possibility.

A. This Court should clearly enunciate the principle that any factor which increases a maximum sentence must be determined by a jury, rather than by a judge.

The statute at hand increases the potential maximum sentence available from ten to twenty years. The actual sentence imposed upon Apprendi here was twelve years, two years (20%) in excess of the maximum sentence he could have received had he been convicted and sentenced only for the predicate crimes to which he pled guilty. The

question, therefore, is directly raised whether a factor which affects a maximum sentence must constitutionally be determined by a jury.

Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed. 2d 350 (1998) stands for the proposition that not every fact expanding a penalty range must be stated in a felony indictment; however, the holding in *Almendarez* was based on recidivisim, which always has been acknowledged as being for the consideration of the sentencing judge, and not an element of an underlying crime, because it is proved simply by reading the defendant's record of prior convictions. That concept has nothing to do with the *Apprendi* case and the extended sentence provision in N.J.S.A. 2C:44-3e., which, again, calls upon the sentencing judge to consider the *mens rea* of the defendant, traditionally an issue for the jury and thus requiring constitutional safeguards.

United States v. Palacios-Casquete, 55 F.3d 557 (11th Cir. 1995) was another recidivisim case, that one involving the deportation of an illegal alien. The Court of Appeals decided that 8 U.S.C. § 1326(b)(2) was a sentencing enhancement subsection, rather than a separate crime. In so finding, the court acknowledged that other Court of Appeals decisions have treated the subsections involved as separate crimes. *See United States v. Campos-Martinez*, 976 F.2d 589 (9th Cir. 1992) and *United States v. Gonzalez-Medina*, 976 F.2d 570 (9th Cir. 1992). Contrary to *Apprendi*, in which the statute requires the sentencing judge to evaluate the state of mind of the defendant in committing the crime, the deportation statute in *Palacios-Casquete* requires the judge merely to review the record of prior convictions.

Specht v. Patterson, 389 U.S. 605, 87 S. Ct. 1209, 18 L.Ed. 2d 326 (1967) was a *habeas corpus* writ involving a petitioner who was convicted for a sex crime, but who was sentenced under a different statute dealing with sex offenders, which brought a much more severe sentence. Justice Douglas, delivering the opinion of the Court, wrote that the sentencing statute " . . . does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact that was not an ingredient of the offence charged." 389 U.S. 605, 608 87 S. Ct. 1209, 1211, 18 L.Ed. 2d 326, 329 (1967).

The Court held that the petitioner was entitled to a full judicial hearing before the magnified sentence could be imposed. The defendant in such a proceeding is entitled to all protections which due process guarantees in state criminal proceedings. "He must be afforded all those safeguards which are fundamental rights and essential to a fair trial . . . ." *Id.* 389 U.S. 605, 609-610, 87 S. Ct. 1209, 1212, 18 L.Ed. 2d 326, 329 (1967).

The semantic debate about whether a statutory fact is an "element of a crime" or a "sentencing factor", which has driven so much of the recent discussion, is, in the end, an empty one. As eloquently articulated by Judge Henry Friendly in *United States v. Kramer*, 289 F.2d 909, 921 (2d Cir. 1961), whatever name is given the factor, when it deeply affects the defendant, it should be resolved by a jury:

> [W]e assume the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge. There is, of course, a certain incongruity in asking a jury to exercise such expertise in the ways of the underworld as to determine the "value" of money orders that can be or have been forged; but the omniscience of the jury extends to harder questions than that. *Id.* at 921.

The idea that an increase in maximum sentence "might" activate the Sixth Amendment was hinted at by Mr. Justice Rehnquist in *McMillan v. Pennsylvania*, 477 U.S. 79, 87-88, 106 S. Ct. 2411, 2417, 91 L.Ed. 2d 67 (1986). Although relegated to a side position in *Almandarez-Torres, supra*, its strength was recognized again in *Jones*, and given new life. This Court, through Justice Souter, recognized in *Jones* that:

> . . . [u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the (carjacking) statute rises only to the level of doubt, not certainty. n.6. *Id.*___U.S.___, 119 S. Ct. 1215, 1224, 143 L.Ed. 2d 311___ (1999).

While this language may be considered dictum, since the Court's ultimate resolution was one of statutory interpretation, it is, at the very least, "well considered" dictum. The present case affords the Court the opportunity to embrace it fully as a constitutional principle. A recent

law review article, written before *Jones*, but having an addendum addressing that decision, has demonstrated the sharp departure which *McMillan* rendered in the sentencing process, and which *Jones* potentially restored. Mark Knoll and Richard Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of McMillan v. Pennsylvania*, 29 Seattle U. L. Rev. 1957 (1999). Knoll and Singer rehearse at great length the pre-*McMillan* federal cases, concluding that every federal court had found that any statutorily enunciated fact which increased a maximum sentence, such as the value and amount of goods stolen or possessed, which dramatically increased the sentence, were elements of the crime which had to be proved to the jury.

In *Jones v. United States, supra*, this Court in reviewing a penalty provision in the federal carjacking law, 18 U.S.C. § 2119, which imposed an extended term of imprisonment of not more than 25 years for a carjacking that entails a serious bodily harm to the victim, decided that such a law should not constitute a sentencing enhancer, but rather should be construed as elements of separate crimes for which a defendant must be found guilty by a jury and by proof beyond a reasonable doubt. Justice Souter, writing for the majority, asserted:

> [T]he terms of the carjacking statute illustrate very well what is at stake. If serious bodily injury were merely a sentencing factor under § 2119(2) . . . then death would presumably be nothing more than a sentencing factor under subsection 3 (increasing the penalty range to life). If a potential penalty might rise from fifteen years to life on a non-jury determination, the jury's role would correspondingly shrink

> from the significance usually carried by determinations of guilt to the relative importance of low-level gate keeping. . . . [I]t is therefore no trivial question to ask whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.*, ___U.S.___, 119 S. Ct. 1215, 1224, 143 L.Ed. 2d 311, ___(1999).

Justice Souter noted his discomfort even with this relatively straightforward, objective non-jury determination. By analogy, the New Jersey hate crime law is even more troubling when it delves into the state of mind of a defendant without the benefit of either notice by indictment, trial by jury or proof beyond a reasonable doubt. This is an attempt by the State to erode crucial constitutional rights by merely labeling its law as a sentencing enhancer. This unquestionably is a denial of due process.

Throughout *Jones*, the Court referred to the fact that the factors of serious bodily harm or death severely increased the maximum sentence. Whether referring to the absolute increase (10 years, or an indeterminate number of years) or the relative increase (2/3 or an indeterminate percentage), *Jones* emphasized again and gain that a critical part of its decision was the dramatic impact which the factor visited upon the defendant. The statute in this case has no less dramatic effect: an increase of ten years, as an absolute basis, is exactly the increase which was involved in *Jones*; an increase from 10 years maximum to 20 years maximum, 100%, is more than the percentage increase involved in *Jones*. No matter how calculated, the increase in the maximum sentence in this

case meets any standard of severity which *Jones* might be seen as having adopted.[1]

This case does not require the Court, however, to reach the concerns, expressed by Mr. Justice Breyer in his dissent in *Jones*, that the Sixth Amendment might invalidate any system (such as the federal sentencing guidelines) in which judges' sentencing discretion was limited and dependent upon specific fact finding. The guidelines, after all, do not increase the statutory maximum; they merely restrict judicial discretion by requiring, upon certain factual findings, an increase within the already established statutory range. The commentators are split on whether *Jones* reaches any or all of such guidelines, but they are unanimous that *Jones* does and should be interpreted to reach any scheme by which a maximum sentence is increased. See, e.g., Knoll and Singer, *supra*; Priester, *supra*.

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[1] Two recent articles, Benjamin Priester, *Further Developments on Previous Symposia: Sentenced for a "Crime" the Government Did Not Prove: Jones v. United States and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 Law and Contemp. Prob. 249 (1999); and Mark Knoll and Richard Singer, *supra*, have each supported the view that this court should adopt, as a constitutional minimum, the rule that the Sixth Amendment is activated by an increase in the maximum sentence.

B. Any doubt in the *Jones* case about the constitutionality of leaving questions of mens rea to the judge rather than to the jury should be resolved now.

The second possible principle, that any factor going to the mental state of the defendant should be resolved by the jury, is even more obvious. In most instances, it would establish a narrower reading of *Jones* than the first. Yet even such a narrow principle would demonstrate that *Jones* has constitutional teeth.

The statute in question makes the question of defendant's "purpose" to intimidate because of "race, color, gender, handicap, religion, sexual orientation or ethnicity" the relevant factor in determining whether the defendant committed "mere" assault or "hate-purposed assault." The New Jersey Supreme Court, well aware that both the New Jersey Code and a commmon law tradition of five hundred years require juries to determine mental states such as purpose, went to heroic efforts to construe "purpose" as "motive." But the fact remains that, however characterized, the defendant's mental state at the time he committed the offense critically affects his sentence. Determinations of such magnitude, particularly those going to mental culpability, have historically been deemed *"mens rea"* issues, and have historically gone to juries. Indeed, one of the true essences of juries is their ability to assess the real culpability, as measured by *mens rea*, of the defendant. As Judge Wecker declared in dissent in the appellate division in this case:

> Because section e elevates the culpability of the crime based on defendant's purpose, that purpose – **whether it be described as motive or**

> **intent** – must be deemed an element of the more serious crime, and not just a sentencing factor. *State v. Apprendi*, 304 N.J. Super. 147, 163, 698 A. 2d 1265, 1273 (1997) (emphasis added). 71a.

The New Jersey hate crime statute goes even beyond the federal carjacking statute by allowing a trial judge to make a determination of a defendant's state of mind when committing a crime, with the purpose to intimidate a member of a race. This is a subjective determination, which must be delegated to a jury. The carjacking statute entailed an objective determination as to whether or not "serious bodily injury" occurred. A defendant's mental state in committing an offense encompassing a purpose to intimidate because of race requires a finding of fact so integral to the offense that it must be characterized as an element of the offense. In effect, a finding by a trial court that a defendant committed biased crimes pursuant to *N.J.S.A.* 2C:44-3e. causes that defendant's offenses to be graded one degree higher for sentencing purposes: for example, third degree crimes can be sentenced as second degree crimes, second degree crimes sentenced as first degree crimes, and first degree crimes are subject to a sentence between 20 years and life in prison. See *N.J.S.A.* 2C:43-7a. The significantly increased sentencing range requires that the finding of a purpose to intimidate must be treated as a material element of the subject crime, and that material element must be treated with notice by indictment, proof by a preponderance of the evidence of the defendant's state of mind, rather than proof beyond a reasonable doubt, and trial by jury.

Justice Brennan wrote:

> Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . . *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-1073, 25 L.Ed. 2d 368, 375 (1970).

Justice Powell wrote:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S. Ct. 1881, 1889, 44 L.Ed. 2d 508, 517 (1975).

N.J.S.A. 2C:44-3e. specifically requires the judge to become a trier of fact to assess the mental intent of the defendant during the commission of his or her crime. As with other criminal statutes where the trier of fact looks to the purpose behind defendant's crime, or his/her *mens rea*, the standard must be proof beyond a reasonable doubt.

Justice O'Hern held that the hate crime statute does not violate the Due Process Clause of the United States Constitution because it merely is a sentencing enhancer, not an element of a crime, and because of this "label," the burden of proof is not subject to the reasonable doubt

standard. See *State of New Jersey v. Apprendi*, 159 N.J. 7, 26-27, 731 A. 2d 485, 495-496 (1999) 25a-26a. The New Jersey Legislature has violated the Due Process Clause of the United States Constitution by creating an element of a crime to determine whether a defendant acted with the purpose to intimidate a person of color, and merely labeling this element a "sentence enhancer".

Legislation in the past has been struck down for this reason. The landmark case on this subject is *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970), in which the United States Supreme Court invalidated a New York juvenile delinquency law, even though it had been labeled as a "civil law" rather than a criminal law pertaining to juveniles. *Id.* 397 U.S. 358, 364, 90 S. Ct. 1068, 1073, 25 L.Ed. 2d 368, 372 (1970). This case, which is now characterized as the *Winship* Rule, dealt with § 712 of the New York Family Court Act, which defined a juvenile delinquent as " . . . a person over seven and less than sixteen years of age who does an act which, if done by an adult, would constitute a crime." *Id.* 397 U.S. 358, 359, 90 S. Ct. 1068, 1070, 25 L.Ed. 2d 368, 370 (1970).

The New York law had a provision which required a trial judge to determine by an adjudicatory hearing whether a juvenile committed his or her "act" by a preponderance of the evidence. *Ibid.* Justice Brennan, writing for the majority, asserted that our criminal jurisprudence is not merely concerned with guilt or innocence in the abstract, but is also concerned with the degree of criminal culpability and, because of this reason, the Court should not be limited to those facts which constitute a crime as defined by a State law. If it were, a state legislature could undermine the interests of criminal courts under the Due

Process Clause by merely redefining the elements which constitute different crimes and characterizing them as factors which bear solely on the nature and extent of punishment. The so-called "civil label of convenience" which has been attached by the legislature must be construed carefully by the courts. *Id.* 397 U.S. 358, 90 S. Ct. 1068, 1073, 25 L.Ed. 2d 368, 372 (1970). The Court held that " . . . [C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in . . . courts, for 'a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution.' " *Id.* 397 U.S. 358, 366-367, 90 S. Ct. 1068, 1073 *citing In re Gault*, 387 U.S. 1, 27, 87 S. Ct. 1428, 1443, 18 L.Ed. 2d 527, ___ (1967).

In the case of Charles Apprendi, Jr. the New Jersey Legislature similarly has undermined the *Winship* Rule, where it has relaxed the standard of proof required by the prosecution to prove that the petitioner committed a crime with the purpose to intimidate a group of individuals because of race by characterizing this crime as a sentence enhancement, rather than as an element of a crime. This is particularly violative of the Due Process Clause of the Constitution in the case *sub judice* because the jurist, acting as the fact-finder, is stepping into the province of a jury, where the judge must determine the mental state and purpose of the defendant by looking at the demeanor of the witnesses, and by evaluating the credibility of each and every lay and expert witness which is, generally speaking, a role for a jury.

The initial concern that legislatures or judges might be attempting to thwart the rule of *Winship* underscores

both the opinions in *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L.Ed. 2d 281 (1977) and *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L.Ed. 2d 67 (1986). The New Jersey Supreme Court held in this case that the New Jersey Legislature was not attempting to evade the requirements of *Winship*, and that it was *bona fide* in allowing the court, rather than the jury, to decide motive. The fact is that *Jones* made such a finding irrelevant: while *McMillan* focused on the malevolence or nefariousness of the legislature, *Jones* restored the proper concern: has the legislature, however inadvertently, deprived the defendant of a basic right to jury? On that question, in this case, there can be only one answer.

In *The Burden of Proof in Criminal Cases: A Comment on the Mullaney-Paterson Doctrine*, 55 Notre Dame Law 380, 383 (1980), Professor Fernand N. Dutle examined the degree to which the courts should permit State legislatures to reallocate burdens of proofs by labeling or defining affirmative defenses as opposed to elements of crimes. The professor examined the Supreme Court case of *Mullaney v. Wilbur, supra*, in which the Court considered the issue whether a defendant had the burden of proving an affirmative defense of adequate provocation with respect to a prosecution for criminal homicide. *Mullaney* made it clear that any factor in a criminal case which constituted an element of a crime must be proven by the State beyond a reasonable doubt, but the legislature has some latitude with respect to allocating proof between the State and the defendant on affirmative defenses, and these constitute a gray area, which could be violative of the Due Process Clause of the United States Constitution. Professor Dutle reasons, from a due process

standpoint, there are some issues which must be proved by the State beyond a reasonable doubt, " . . . since the basic idea behind the *Winship* requirement of proof beyond a reasonable doubt is that the State should demonstrate the defendant's blameworthy conduct. . . . " *Id.* at 384.

Professor Dutle states that whatever the linguistic form of the statutory language, any law dealing with a premeditation or deliberation formula with respect to conduct should be proven by the State beyond a reasonable doubt. *Id.* at 384-385. The New Jersey hate crime statute essentially boils down to a premeditation or deliberation law, where the fact-finder must inquire what was the mental state of the defendant when he engaged in his blameworthy conduct. Regardless of the linguistic wording of the statute, whether we are characterizing it as a sentence enhancement or an element of a crime, it really is nothing less than an examination into the purpose for the crime which, under the Due Process Clause, must be proven beyond a reasonable doubt by the State, and must be decided by a jury.

Whatever the precise limits of *McMillan* or *Jones*, the cloud which has overhung judicial and jury power since *McMillan* was dissipated to a substantial degree by both the decision and the opinion in *Jones*. At least so far as this case raises the precise boundaries of that decision, its resolution would promote stability and certainty in hundreds of cases involving scores of statutes in this country. For that reason, the Court should grant the writ, and hear the merits of this case.

CONCLUSION

Based on the foregoing, it respectfully is requested that the decision by the New Jersey Supreme Court be reversed, the New Jersey hate crime law be declared unconstitutional, the twelve-year term of imprisonment on Count 18 be overturned, and this case be remanded to the trial court for a jury trial on the issue of whether there is proof beyond a reasonable doubt that this defendant committed the crime charged because of race.

Respectfully submitted,

JOSEPH D. O'NEILL, P.A.
Attorneys for Petitioner

JOSEPH D. O'NEILL

CHARLES I. COANT

RICHARD G. SINGER

Dated: September 17, 1999

SUPREME COURT OF NEW JERSEY
A-164 September Term 1997

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

Argued October 13, 1998 – Decided June 24, 1999

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 304 *N.J. Super.* 147 (1997).

Joseph D. O'Neill argued the cause for appellant (*Mr. O'Neill*, attorney; *Mr. O'Neill* and *Charles I. Coant*, on the brief).

Jacqueline E. Turner, Assistant Deputy Public Defender, argued the cause for *amicus curiae*, Office of the Public Defender (*Ivelisse Torres*, Public Defender, attorney).

Lisa Sarnoff Gochman, Deputy Attorney General, argued the cause for respondent (*Peter Verniero*, Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by

O'HERN, J.

An issue that is surfacing with increasing frequency in criminal cases is whether a given portion of a statute constitutes an element of an offense or, instead, is a sentencing provision. The answer determines whether the factual determinations for which the provision calls are to be made by the fact-finder or the sentencer,

and whether the reasonable doubt standard of proof must be applied.

[67 U.S.L.W. 3289, Vol. 67, No. 16 (Nov. 3, 1998).]

This appeal presents such a question. The case concerns the constitutionality of one provision of New Jersey's hate crime laws. With certain exceptions, the provision allows enhanced sentencing in any case in which "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J.S.A. 2C:44-3(e). (For convenience we may sometimes refer to such a purpose as a "biased purpose.") The constitutional question is whether a jury must find that purpose to have existed beyond a reasonable doubt before a court may impose an extended sentence for a hate crime. We find that the provision has been narrowly tailored to meet First Amendment concerns, and represents a legislative attempt to comply with a constitutional mandate, not a legislative attempt to circumvent due process rights to trial by jury. We affirm the judgment of the Appellate Division upholding defendant's extended sentence for a bias crime.

I

Early on the morning of December 22, 1994, police arrested defendant at his home in Vineland for the shooting of a neighbors' home. The neighbors were a black family living in an all-white neighborhood. This was the fourth time that the neighbors' home had been fired upon. On September 24, 1994, a single bullet pierced their

window, and twice in November 1994, bullets struck the exterior of the home. After the December 22 shooting, one of the neighbors recognized defendant's grey Chevrolet truck driving away. The police were called.

The police arrived approximately twenty minutes later and arrested defendant at his home. Acting on a later-acquired search warrant, police found various weapons at defendant's home, including a .22-caliber rifle, with laser sights and a silencer attached, and an anti-personnel bomb. During the police questioning, defendant admitted that he had fired four or five rifle shots into the home. Defendant gave a later statement in which he admitted that although "he does not know the . . . victims or the family, but because they are black in color he does not want them in the neighborhood. . . . " He said that he was "just giving them a message that they were in his neighborhood."

A Cumberland County grand jury returned a twenty-two-count indictment against defendant. It included charges of possession of a firearm for an unlawful purpose, possession of a prohibited weapon, attempted murder, attempted aggravated assault, harassment, and possession of a destructive device.

Defendant negotiated a plea agreement under which he pled guilty to three of the counts. Two counts included the second-degree crimes of possessing a firearm for an unlawful purpose on September 24 and December 22, 1994. The third involved unlawful possession of a prohibited weapon, an anti-personnel bomb. Under the terms of the plea, any sentence imposed on the prohibited weapon count was to be concurrent with the sentences to be

imposed on the two unlawful purpose counts. The plea agreement left the determination of the sentence on these two counts to the discretion of the court. In addition, the State reserved the right to make an application under the hate crimes law for imposition of an extended sentence on one count of the indictment. Possession of a weapon for an unlawful purpose is a second-degree crime for which the ordinary term is between five and ten years. If approved, an extended term on one of those counts exposed Apprendi to a maximum penalty of twenty years' imprisonment with ten years of parole ineligibility. When the weapon possessed is a firearm, the Graves Act requires the imposition of a minimum term of imprisonment of at least one-third of the sentence imposed or three years, whichever is greater. *N.J.S.A.* 2C:43-6(c). As part of his plea agreement, Apprendi reserved the right to contest the constitutionality of *N.J.S.A.* 2C:44-3(e), the hate-crime sentence enhancer.

At a hearing prior to sentencing, defendant offered the testimony of a psychologist who had evaluated defendant's mental state in order to establish the motive underlying the crimes. The witness shed light on certain psychological abnormalities of defendant. His condition did not rise to a level sufficient to establish a diminished capacity or insanity defense under *N.J.S.A.* 2C:4-1. The psychologist diagnosed defendant as having an obsessive-compulsive disorder, a cyclothymic disorder (a type of temperament alternating moods of elation and depression), kleptomania (a tendency to steal), drug dependence, and alcohol abuse. Additionally, the psychologist concluded that although the defendant knew that he was discharging the weapon toward the house and that it was

wrong to do so, "his judgment and impulse control were substantially impaired at the time of the accident." Following that hearing, the State moved on September 5, 1995 for an extended term of imprisonment pursuant to *N.J.S.A.* 2C:44-3(e). After consideration of the testimony taken at the hearing, the trial court rejected the psychological defense, and concluded that defendant's actions were the product of racial bias thereby satisfying the statute. The court sentenced Apprendi on one of the unlawful-purpose counts to an extended term of twelve years' imprisonment with four years of parole ineligibility. Because this was Apprendi's first offense, the court made the lesser sentences on the other counts concurrent with the extended term. Other fines and penalties were imposed.

On appeal, Apprendi charged that he had been sentenced under an unconstitutionally vague law in that it permitted a court to sentence defendant to an extended term of imprisonment on so vague a basis as that the crime had been committed "at least in part with ill will, hatred or bias toward the victim." He further argued that the statute unconstitutionally allows imposition of an extended term of imprisonment based on proof of the biased purpose by a preponderance of the evidence rather than proof found by a jury beyond a reasonable doubt. A majority of the Appellate Division dismissed the vagueness challenge because in 1995, before the date of Apprendi's sentence, the Legislature had already deleted the words, "at least in part with ill will, hatred or bias toward the victim." 304 *N.J.Super.* 147, 152 (App.Div.1997). The 1995 amendment

excising the words was in response to this Court's decision in *State v. Mortimer*, 135 *N.J.* 517, *cert. denied*, 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L.Ed.*2d 351 (1994), holding that the same language in *N.J.S.A.* 2C:33-4(d) (a provision of our hate-crime laws addressing harassment), was unconstitutionally vague. The Appellate Division majority found that the use of the preponderance of the evidence standard to mandate an extended term did not violate the constitutional requirement that the State must prove each element of a crime beyond a reasonable doubt. 304 *N.J.Super.* at 153. The panel found that the Legislature had not made racial bias an element of the crime charged because the provision was included in a section of the Criminal Code entitled "authority of court in sentencing." *Ibid.* The majority reasoned that "[a]s to sentencing factors which are not elements of a crime, the State's burden of proof is not subject to the reasonable doubt standard." *Ibid.* It compared this sentencing provision to that of Graves Act sentencing under which the State need not prove beyond a reasonable doubt that the actor possessed a firearm during the commission of a crime as a predicate to the imposition of a Graves Act sentence of mandatory parole ineligibility. *Id.* at 155. One judge dissented. She found that the federal and State constitutions require that a jury decide each element of a crime beyond a reasonable doubt and that the

> "purpose to intimidate . . . because of race, [or] color" is an element of the crime when that purpose raises the sentence for the crime. . . . The State's power to define away the elements of the crime cannot extend, as the majority holds, to defining away the actor's culpable purpose [when it served to enhance his sentencing.]
>
> [Id. at 162.]

Defendant appealed as of right under Rule 2:2-1(a)(2) on the basis of the dissent below.

II

A.

In order to understand this case, it is necessary to understand its background. On May 13, 1991, Steven Vawter and David Kerns spray-painted a Nazi swastika and words that seemed to spell "Hitler rules," on a synagogue in Rumson, New Jersey. On the same day, they spray-painted a satanic legend on the driveway of a nearby Roman Catholic church. The police charged Vawter and Kerns with violations of sections 10 and 11 of New Jersey's hate crime statute. *N.J.S.A.* 2C:33-10 and -11 forbade assaultive intimidation by the use of hateful symbols such as a swastika and the placement of such symbols on places of religious worship.

On August 23, 1991, David Mortimer and two juveniles spray-painted hate-filled words on the garage door of a Pakistani family's home in East Brunswick, New Jersey. Police charged Mortimer with two counts of ethnic harassment under *N.J.S.A.* 2C:33-4(d), which forbade harassment by offensive communications and made the offense a fourth-degree crime if one acted in part with ill will, hatred or bias and with a purpose to intimidate because of race, color, religion, sexual orientation or gender. These two 1991 cases, *Vawter* and *Mortimer*, were the first major challenges to New Jersey's hate crime laws. *State v. Vawter*, 136 *N.J.* 56 (1994); *State v. Mortimer*, 135 *N.J.* 517 (1994), *cert. denied*, 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994).

States began to enact laws to counter the evil of hate crimes in the 1980s.

> Today nearly every state, using varied approaches, has enacted legislation to punish acts of bias-motivated crime. Some states created new crimes of bias-motivated violence or intimidation. Others created new crimes that consist of the bias-motivated commission of a crime that already exists in [a] statute. Other states provided for enhanced penalties where commission of a crime was motivated by bias, or chose to treat the actor's bias motivation as an aggravating circumstance in sentencing.
>
> [Camilla Nelson, *Hate Crime on the Internet*, 1997 *SPG NAAG Civ. Rts. Update* 1, 2 (1997).]

New Jersey was one of the first states to adopt an anti-hate crime law, *L.* 1981, *c.* 282. In generic terms, the 1981 law outlawed the burning of crosses or placing of swastikas on public or private property with a purpose to terrorize others by threats of violence (Section 10) and outlawed the placing of such graffiti on houses of worship or cemeteries (Section 11).

In 1990, the Legislature expanded the coverage of our hate crime laws by enacting the "Ethnic Intimidation Act," *L.* 1990, *c.* 87. That law (1) made the disorderly persons offense of simple assault a crime of the fourth degree if the actor had a biased purpose in selecting the victim, *N.J.S.A.* 2C:12-1e; (2) made the petty disorderly persons offense of harassment a crime of the fourth degree if the actor had a biased purpose in selecting the victim, *N.J.S.A.* 2C:33-4d; and (3) added a provision allowing an extended term of imprisonment for other

crimes of the first, second or third degree, *N.J.S.A.* 2C:44-3(e).

For convenience, we refer in this opinion to the several provisions of our hate-crime statute as Section 4d, Sections 10 and 11, Section 12e, and Section 44-3(e).

In signing the legislation, Governor Florio stated:

> From now on, the law in New Jersey will be intolerant of ethnic intimidation. Those who commit these crimes of hate are going to face additional charges. From now on, hate crimes will be serious crimes, whether it's a phone call in the middle of the night or vandalism that leaves hateful symbols in its wake or racial slurs.
>
> [Wisam Ali, *Florio extends term for 'crimes of hate'*, *Home News*, Aug. 10, 1990.]

That law was similar to a model hate crime statute recommended by the Anti-Defamation League of B'nai B'rith (ADL). The model was "intended to assist state and local governments which would like to enact hate crime laws." Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 *N.Y.U.L. Rev.* 564, 589 (1998). The ADL recommended that there be "a separate substantive crime for institutional vandalism, [and a] penalty enhancement for crimes motivated by certain biases." *Id.* at 589-90. The model statute provides, in pertinent part, "that a person is guilty of intimidation when he or she violates specified preexisting criminal laws . . . by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of the victim." *Id.* at 589 n. 146.

B.

While *Vawter* and *Mortimer* were pending, two other cases were working their way through the courts of other states. In one case, white teenagers had burned a cross on the fenced-in yard of a black family in St. Paul, Minnesota. *R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 112 *S. Ct.* 2538, 120 *L. Ed.* 2d 305 (1992). Convicted under St. Paul's hate crime ordinance, the youths appealed to the United States Supreme Court. In *R.A.V., supra*, 505 *U.S.* at 384-85, 112 *S. Ct.* at 2543-44, 120 *L. Ed.* 2d at 318-19, the Supreme Court held that when a state regulates unprotected expression (fighting words), it cannot discriminate on the basis of content or viewpoint. Under that rationale, a state may prohibit the expression of fighting words (threats, harassment, etc . . .) but if a state attempts to prohibit only those fighting words that contain racist hate speech, the regulation will be subject to strict scrutiny and may be found to be under-inclusive.

States breathed a collective "sigh of relief" when some of the constitutional concerns regarding hate crime statutes were alleviated by the Court's decision one term later in *Wisconsin v. Mitchell*, 508 *U.S.* 476, 113 *S. Ct.* 2194, 124 *L. Ed.* 2d 436 (1993). George G. Size & Glenn R. Britten, *Is There Hate Speech?: R.A.V. and Mitchell in the Context of First Amendment Jurisprudence*, 21 *Ohio N.U.L. Rev.* 913, 913 (1995). In that case a group of black youths, including Mitchell, pointed out a white boy on the street, beat him until he was unconscious, and then stole his tennis shoes. *Mitchell, supra*, 508 *U.S.* at 480, 113 *S. Ct.* at 2196-97, 124 *L. Ed.* 2d at 442. The Supreme Court in *Mitchell, supra*, held that the First Amendment does not prohibit a state from providing enhanced punishment for

a crime based on the actor's discriminatory purpose in committing the crime. *Id.* at 486, 113 *S. Ct.* at 2200, 124 *L. Ed.* 2d at 445-46 (citing *Dawson v. Delaware*, 503 *U.S.* 159, 165, 112 *S. Ct.* 1093, 1097, 117 *L. Ed.* 2d 309, 317 (1992)). Whereas the invalidated St. Paul ordinance in *R.A.V.* was expressly directed at expression, *Mitchell* explained that "[the sentence enhancer] in this case is aimed at conduct unprotected by the First Amendment." *Id.* at 487, 113 *S. Ct.* at 2201, 124 *L. Ed.* 2d at 447.

It is not perfectly clear however, in what sense the hate crime sentence enhancer upheld in *Mitchell* was directed at conduct, whereas the St. Paul ordinance struck down in *R.A.V.* was directed at speech. Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-Abortion Protests*, 29 *U.C. Davis L. Rev.* 553, 560 (1996). Both ordinances appeared to have been "directed at bias-motivated behavior." *Id.* at 560. A more cynical view may be that the Supreme Court "shrugged off" without making a "full retreat" from the position that it had taken in *R.A.V.* Robert R. Riggs, *Punishing the Politically Incorrect Offender Through "Bias Motive" Enhancements: Compelling Necessity or First Amendment Folly?*, 21 *Ohio N.U.L. Rev.* 945, 950 (1995). "Ultimately, stare decisis leaves . . . no alternative but to follow the complex footsteps of *Vawter* and *R.A.V.*" Lorri R. Forter, *The Role of Precedent in Hate Crime Decisions*, 5 *Temp. Pol. & Civ. Rights L. Rev.* 243, 253 (1996).

C.

Consistent with the principles of the two cases, our Court has struck down the features of the New Jersey

hate-crime law that fall within the pattern of *R.A.V.* as being directed at speech or expression. Conversely, our Court has upheld the features of the law that fall within the pattern of *Wisconsin v. Mitchell* as being penalty-enhancers.

In *Vawter,* Vawter and Kerns had been charged under Sections 10 and 11 of the 1981 law. The Court found that those Sections represented content-based restrictions that were unconstitutional because they punished only threats or displays of graffiti expressive of certain beliefs, not all threats. *Vawter, supra,* 136 *N.J.* at 75. The Court concluded that in adopting those sections, the Legislature was "obviously expressing its disagreement with the message conveyed by the conduct that the statutes regulate." *Id.* at 68. The Court "reluctantly" based its decision on the Supreme Court's decision in *R.A.V., supra. Id.* at 70. In his separate opinion in *Vawter,* Justice Stein perceived the flawed logic of *R.A.V.*'s "underbreadth" analysis. *Id.* at 98 (Stein J., concurring). He viewed Sections 10 and 11 as step-by-step legitimate responses to "the most virulent and dangerous formulation of bias-motivated incitements to violence." *Ibid.*

Mortimer, on the other hand, had been charged with one count of harassment under *N.J.S.A.* 2C:33-4d. Distinguishing the harassment provisions in Section 4d from those in Sections 10 and 11, the Court dismissed Mortimer's First Amendment challenge. Justice Clifford explained that the St. Paul ordinance "prohibited the expression of hate," while Section 4d "increases the level of the crime only when a person acts on his or her beliefs and selects the victim with a purpose to intimidate because of one of the specified circumstances – race,

color, religion, sexual orientation, or ethnicity. . . . [Thus,] Section 4 proscribes only the harassing conduct itself." *Mortimer, supra,* 135 *N.J.* at 528. The Court concluded that the statutory language, "at least in part with ill will, hatred or bias toward the victim," was unconstitutionally vague because it failed "to communicate with sufficient clarity what the statute prohibits." *Id.* at 533. In order to avoid the vagueness problem and thus construe the statute constitutionally, the Court excised the vague language from subsection d. *Id.* at 534. Following the decision in *Mortimer,* the Legislature amended *N.J.S.A.* 2C:33-4d and *N.J.S.A.* 2C:44-3(e) to excise the vague language.

Although it is true that in *Wisconsin v. Mitchell,* the jury found that the defendant had intentionally selected his victim based on race, nothing in *Mitchell* or *Mortimer* alerted the Legislature to the concern that the penalty-enhancing provisions of its hate crime law would be unconstitutional because a judge, not a jury, found the biased purpose to intimidate by a preponderance of the evidence. The question is – when does due process require jury findings beyond a reasonable doubt.

III

A.

The Due Process Clause of the Fourteenth Amendment requires that the essential elements of a crime be proven beyond a reasonable doubt. *In Re Winship,* 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368 (1970). There is, however, no litmus test or unerring "constitutional calculus" for determining what is an essential element of a

crime. *N.J.S.A.* 2C:1-14(h) defines an element of an offense as:

> (1) such conduct or (2)such attendant circumstances or (3)such a result of conduct as
>
> > (a) is included in the description of the forbidden conduct in the definition of the offense;
> >
> > (b) establishes the required kind of culpability;
> >
> > (c) negatives an excuse or justification for such conduct;
> >
> > (d) negatives a defense under the statute of limitations;
> >
> > (e) establishes jurisdiction or venue.

These definitions do not explicitly cover Section 44-3(e).

Mullaney v. Wilbur, 421 *U.S.* 684, 704, 95 *S. Ct.* 1881, 1892, 44 *L. Ed.* 2d 508, 522 (1975), held that under a Maine statute that defined the offense of first-degree murder in terms of the absence of heat of passion, due process required the State to bear the burden on that fact. *Martin v. Ohio*, 480 *U.S.* 228, 234, 107 *S. Ct.* 1098, 1102, 94 *L. Ed.* 2d 267, 274-75 (1987), upheld a law imposing on a defendant the burden of proof of self-defense because the same evidence will often negate the State's case even if insufficient to prove self-defense by a preponderance of the evidence. In *Patterson v. New York*, 432 *U.S.* 197, 220-21, 97 *S. Ct.* 2319, 2332, 53 *L. Ed.* 2d 281, 298 (1977), because New York established the penalty for second-degree manslaughter on the basis of mitigation premised upon a finding of 'extreme emotional disturbance,' the Court permitted New York to impose on the defendant

the burden of proving that factor. *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S. Ct.* 2411, 91 *L. Ed.* 2d 67 (1986), upheld a Pennsylvania statute that contained a sentencing factor – "visible possession of a firearm" – the presence of which required the judge to impose a minimum prison term of five years. The Court held that the Constitution did not require Pennsylvania to treat the factor as an element of the crime. *Id.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79. In so holding, the *McMillan* Court said that the State's "link[ing] the 'severity of punishment' to 'the presence or absence of an identified fact' " did not automatically make that fact an "element." *Id.* at 84, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 294 (quoting *Patterson, supra*, 432 *U.S.* at 214, 97 *S. Ct.* at 2329, 53 *L. Ed.* 2d at 294). Citing *Patterson*, the Supreme Court said that "the state legislature's definition of the elements of the offense is usually dispositive." *Id.* at 85, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 75. It said that it would not "define precisely the constitutional limits" of a legislature's power to define the elements of an offense. *Id.* at 86, 106 *S. Ct.* at 2416, 91 *L. Ed.* 2d at 76. Finally, the Supreme Court held that, whatever those limits might be, the State had not exceeded them. *Ibid.*

The primary concern of the Supreme Court in this series of cases has been whether "states would *circumvent due process* by redefining the essential elements of guilt as affirmative defenses or as sentencing factors." *State v. Krantz*, 788 *P.*2d 298, 304 (1990) (emphasis added), *cert. denied.*, 498 *U.S.* 938, 111 *S. Ct.* 341, 112 *L. Ed.* 2d 306 (1990). Because the Supreme Court has declined to "define precisely the constitutional limits" on the states' ability to define elements of an offense, *McMillan, supra,*

477 *U.S.* at 86, 106 *S. Ct.* at 2416, 91 *L. Ed.* 2d at 76, we must attempt to determine what those limits are.

B.

We begin by stating the obvious. Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense. Were that the case, the Legislature could just as easily allow judges, not juries, to determine if a kidnaping victim has been released unharmed. *See State v. Federico*, 103 *N.J.* 169 (1986) (requiring State, in order to establish first-degree kidnaping offense, to prove beyond a reasonable doubt that victim was not released unharmed).[1]

Second, the constitutional question may not be avoided by characterizing a biased "purpose to intimidate" as a "motive". Of course it is true that motive is not an essential element of a crime. But in ordinary circumstances proof of motive does not increase the penal consequences to an actor. Whether one kills out of jealousy or for pecuniary gain does not increase the non-capital sentence for the crime. Whether one steals to put bread on a table or to feed a drug habit does not increase the sentence for theft. A finding under Section 2C:44-3(e) of a

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[1] Federal courts have split on the extent to which a punishment scheme may be viewed as a sentence enhancement provision before it amounts to the definition of a new crime. *Compare United States v. Stone*, 139 F.3d 822 (11th Cir.1998), *with United States v. Palacios-Casquete*, 55 F.3d 577 (11th Cir.1995), *cert. denied*, 516 *U.S.* 1120, 116 *S. Ct.* 927, 33 *L. Ed.* 2d 855 (1996).

"motive" to intimidate because of the victim's race or ethnicity has vastly different consequences than in regular criminal proceedings. Labels do not afford an acceptable answer. Indeed, the exclusion of the words "at least in part with ill will, hatred or bias toward the victim" limits our ability to view this finding as merely a search for motive. We must search for firmer principles of decision.

Our existing precedent does not control the disposition of this case. Although *Mortimer, supra*, assumed in the prosecution of a Section 4 harassment offense that evidence of a biased purpose would be "introduce[d] . . . at trial" as part of the "required state of mind or *mens rea*" under the statute, 135 *N.J.* at 531, 534, the Court did not address the Section 43 sentence enhancer. Similarly, *State v. Camacho*, 153 *N.J.* 54, 56-57 (1998), posed the question for resolution in the case as "whether intent to use a firearm against the person, as opposed to the property, of another is an element" of possession of a weapon for an unlawful purpose entitling a defendant to a jury trial on that issue or was instead a sentencing factor for the court. *Camacho* did not explore the underlying question of the constitutional limits on allocating sentencing factors to a judge or jury.

C.

Any disposition that we make is necessarily tentative in the sense that the final word on this subject will have to come from the United States Supreme Court. The recently enacted amendments to the federal sentencing

guidelines now include a hate crime penalty enhancement provision that applies to all federal crimes. *See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. N.* 103-322, § 280003 (1994), 108 *Stat.* 2096; 28 *U.S.C.A.* § 994. Effective November 1, 1995, federal sentencing guidelines provide that the defendant's offense level is to be increased by three levels

> [i]f the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person. . . .
>
> [18 U.S.C.A. § 3A1.1.]

Although the federal hate crimes law requires the jury to resolve the issue of biased purpose as part of any trial, the law allows, in the same circumstances as of this case, a judge to determine beyond a reasonable doubt that the defendant intentionally selected the victim because of the race, creed, or other characteristic of the victim. Eventually then the United States Supreme Court will have to resolve the issue that we face in this case. For now, we must examine its existing precedent to determine the proper disposition.

In its most recent treatment of the subject, *Jones v. United States*, ___ *U.S.* ___, 119 *S. Ct.* 1215, 1222, ___ *L. Ed.* 2d ___ (Mar. 24, 1999), the Court, in order to avoid an

interpretation that would pose "grave and doubtful constitutional questions," held as a matter of statutory construction, not constitutional requirement, that provisions of the federal carjacking statute that established higher penalties to be imposed when the offense results in serious bodily injury or death constituted additional essential elements of the offense. As essential elements of an offense, these factual matters must be decided beyond a reasonable doubt by a jury, not a judge. *In re Winship, supra*, 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368. In the course of its opinion in Jones, the Court stated that

> under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the [carjacking] statute rises only to the level of doubt, not certainty.
>
> [*Jones, supra*, ___ *U.S.* ___ n.6, 119 *S. Ct.* at ___, ___ *L. Ed.* 2d ___ n.6.]

The five members of the majority in *Jones* included one member who had joined a different formulation in the Supreme Court's 1998 opinion, *Almendarez-Torres v. United States*, 523 *U.S.* 224, 118 *S. Ct.* 1219, 140 *L. Ed.* 2d 350 (1998).

Because the language in *Jones* was not essential to its holding, and because the Court did not expressly overrule the *Almendarez-Torres* formulation, we believe that

case still states the rationale that we must apply here.[2] In *Almendarez-Torres*, the Court upheld a statute that treats an alien's earlier illegal entry as a sentencing factor upon a subsequent conviction of illegal re-entry, rather than as an element of that offense. *Id.* at ___, 118 *S. Ct.* at 1233, 140 *L. Ed.* 2d at ___. The Court explained, "to hold that the Constitution requires that recidivism be deemed an 'element' of [an] offense would mark an abrupt departure from a longstanding tradition of treating recidivism as 'going to the punishment only.' " *Id.* at ___, 118 *S. Ct.* at 1231, 140 *L. Ed.* 2d at ___ (quoting *Graham v. West Virginia*, 224 *U.S.* 616, 629, 32 *S. Ct.* 583, 587-88 (1912)). Rather than to reinvent the analysis, we will simply restate it in full:

> In assessing petitioner's claim [that a jury not a judge would have to establish beyond a reasonable doubt that Almendarez had previously entered the country illegally], we have examined McMillan to determine the various features of the case upon which the Court's conclusion arguably turned. The McMillan Court pointed out: (1) that the statute plainly "does not transgress the limits expressly set out in Patterson," id., at 86, 106 S. Ct., at 2416; (2) that the defendant (unlike Mullaney's defendant) did not face " 'a differential in sentencing ranging from a nominal fine to a mandatory life sentence,' " 477 U.S., at 87, 106 S. Ct., at 2417 (quoting Mullaney, 421 U.S., at 700, 95 S. Ct., at 1890); (3) that the statute did not "alte[r] the maximum penalty for

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[2] We acknowledge that the Jones Court specifically excepted recidivism or prior convictions from its general statement of the law concerning sentence enhancers, and therefore had no occasion to overrule *Almendarez-Torres*. *Jones, supra*, ___ *U.S.* ___, 119 *S. Ct.* at 1227, ___ *L. Ed.* 2d ___.

> the crime" but "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it," 477 U.S., at 87-88, 106 S. Ct., at 2417; (4) that the statute did not "creat[e] a separate offense calling for a separate penalty," id., at 88, 106 S. Ct., at 2417; and (5) that the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense," but, to the contrary, "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor," id., at 88, 89-90, 106 S. Ct., at 2417, 2418.
>
> [*Id.* at ___, 118 *S. Ct.* at 1230, 140 *L. Ed.* 2d at ___.]

With but one exception, that the Section 44-3(e) finding does "alter the maximum penalty for the crime," the hate-crimes enhancer resembles *McMillan* in respect of all of the other factors. The statute plainly does not transgress the limits set out in *Patterson* that due process of law does not allow the state to shift the burden of proof by presuming a necessary ingredient upon proof of the other elements of the offense, 432 *U.S.* at 215, 97 *S. Ct.* at 2329-30, 44 *L. Ed.* 2d at 295 (1975); the differential in sentencing is not between a nominal fine and mandatory life sentence; the statute does not create a separate offense calling for a separate penalty; the statute gives no impression of having been tailored to permit the bias finding to be a "tail that wags the dog of the substantive offense." There is simply no indication that the Legislature restructured its criminal code and sentencing structures in an attempt to "evade" the commands of *Winship*,

supra, a dominant theme underlying the Court's decision in *Mullaney*, *supra*, 421 *U.S.* at 698, 95 *S. Ct.* at 1889, 44 *L. Ed.* 2d at 519; *see Adamson v. Ricketts*, 865 *F.2d* 1011 (9th Cir. 1988) *cert. denied*, 497 *U.S.* 1031, 110 *S. Ct.* 3287, 111 *L. Ed.* 2d 795 (1990)(invalidating Arizona's death sentencing provisions in part because it *withdrew* from its substantive criminal law various elements traditionally reserved for jury determination and reclassified them as sentencing factors).

On the contrary, the Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis, is a very traditional sentencing factor. *N.J.S.A.* 2C:44-1(2) has long allowed sentencers to take into account the gravity of the harm inflicted on the victim.

Altering the maximum penalty in and of itself has been held not to change the constitutional calculus. In *State v. Krantz*, *supra*, 788 *P.*2d at 303, the Montana Supreme Court found that its "weapon enhancement" sentencing statute did not offend due process even though the determination of weapon usage "could lead to a punishment beyond the maximum provided for the underlying crime." It reasoned that the Montana weapon enhancement statute does not create a separate crime or element of a crime. In another sense, a discretionary sentence enhancer may not have as drastic a penal consequence as a mandatory sentence without possibility of parole.

We agree with the concurring member of the Appellate Division that, like our Graves Act decisions, this decision will pose no threat to constitutional liberties. Almost invariably there is no real doubt about the factual issue that determines the sentencing decision. In *State v. White*, 98 *N.J.* 122 (1984), the underlying conviction of robbery in the first degree was based on the presence of a firearm. The legal issue was whether an accomplice who did not actually possess the weapon could be sentenced to a Graves Act sentence. In *State v. Stewart*, 96 *N.J.* 596 (1984), the defendant admitted that there were firearms in the truck that he was using at the time of the robbery, but contended that such constructive possession, as opposed to use, did not warrant a Graves Act sentence. In like fashion, we believe that in cases like *Vawter* (had the defendants been charged other than under Sections 10 & 11) and *Mortimer*, there is rarely any doubt whether the defendants committed the crimes with the purpose of intimidating the victim on the basis of race or ethnicity. In addition, enhanced sentencing under Section 44-3(e) is limited to cases in which there is said to be a "compelling State interest" to vindicate constitutional rights to be free of invidious discrimination. *People v. MacKenzie*, 40 *Cal. Rptr.* 2d 793, 800-01 (Ct. App. 1995) (citing *Mitchell*, *supra*, 508 *U.S.* at 488, 113 *S. Ct.* at 2201, 124 *L. Ed.* 2d at 447).

Amicus Public Defender has prudently argued that the Court should hesitate to endorse this sentencing scheme because the concept (removing the elements of a crime from its substantive definition and including them in the sentencing provisions of the Code) could undermine traditional rights to trial by jury and the due process of law. There should be no mistake that the Court

would not permit the Legislature (even were it so inclined) to remove traditional *mens rea* or grading factors (such as the absence of passion/provocation in a murder) from the substantive definition of a crime to be determined by a jury and reallocate them for determination by a judge as part of the sentencing process. *See State v. Smith*, 279 *N.J. Super.* 131 (App. Div. 1995) (holding grading provisions based on age of kidnaping victim are elements of offense). The issue posed in this case is all but idiosyncratic owing to the constitutional concerns about punishing thought itself.

We acknowledge that Florida has interpreted its similarly-worded statute to require a jury to find as a predicate to sentencing that the crime was bias motivated. *State v. Stalder*, 630 *So.*2d 1072 (Fla. 1994). We believe that resolution poses as many problems as it solves. To allow generally in criminal trials proof of the biases of the accused creates an added risk of prejudice for defendants. It would open trials to evidence of former acts of bias on the part of the actor. *Ayers v. State*, 645 *A.*2d 157 (Md. 1994) *cert. denied*, 513 *U.S.* 1130, 115 *S. Ct.* 942, 130 *L. Ed.* 2d 886 (1995); *but see Mortimer, supra*, 135 *N.J.* at 538 (cautioning that as condition of admission of other acts of bias, the nexus between incidents must be strong). It would inject into the trial of cases issues of racial or ethnic bias that have a potential to inflame a jury. *State v. Crumb*, 277 *N.J. Super.* 311, 321 (App. Div. 1994), *certif. denied.*, 153 *N.J.* 215 (1998). In *Crumb, supra*, because "the bias count . . . may, if tried with the other counts, skew decisions regarding admission of evidence," the court severed the bias count from the trial. *Ibid.* In *State v. Carter*, 91 *N.J.* 86 (1982), the Court narrowly affirmed the

murder conviction of defendants, holding that the admission of evidence tending to show that their actions were motivated by racial revenge was not so prejudicial as to outweigh its probative value.

IV

To sum up, as the dissent observes, *post* at ___ (slip op. at 37), a statutory argument can be made that the actor's biased purpose to intimidate establishes a required kind of culpability, an element of the offense that must be determined by the jury. However, the biased purpose is not an element of the weapons possession charge. It sufficed to establish that offense that defendant intended to shoot at the victim's home, an unlawful purpose in itself. The more significant problem with defendant's statutory argument is that the Legislature has expressly provided otherwise. The question then is not statutory but constitutional. The reasons that impelled the Legislature to provide that the actor's biased purpose be treated as a sentencing factor are not constitutionally suspect. There is a subtle interplay of constitutional values involved – a First Amendment concern expressed in *R.A.V.* that society not punish thought itself, even hateful thoughts, and a compelling state interest to vindicate the rights of citizens to be free of invidious discrimination. *Wisconsin v. Mitchell, supra*, 508 *U.S.* at 487, 113 *S. Ct.* at 2201, 124 *L. Ed.* 2d at 447.

"To declare a statute unconstitutional is a judicial power to be delicately exercised." *Harvey v. Essex County Bd. of Freeholders*, 30 *N.J.* 381, 388 (1959). "[A] legislative act [should] not be declared void unless its repugnancy to

the constitution is clear beyond reasonable doubt." *Gangemi v. Berry*, 25 *N.J.* 1, 10 (1957). The claim that the statute here conflicts with a constitutional right is far from clear beyond a reasonable doubt. On balance, we find that in this case the "constitutional calculus" of *McMillan* sustains the statutory scheme. The hate-crime enhancer obviously requires a delicate balance of constitutional rights. We do not punish thought. We do punish more severely crimes involving particularly vulnerable victims.[3] We are certain that the law will not be abused. The requirements of the act are strict. It is not enough to show that during the commission of a crime the actor may have exhibited bias. The question is whether the purpose of the crime was to exhibit bias. In *State v. Dobbins*, 605 *So.*2d 922 (Fla. Dist. Ct. App. 1992), *aff'd*, 631 *So.*2d 303 (Fla. 1994), the court found that evidence of the defendant's racial bias against people of the Jewish faith was not enough to invoke a sentence enhancement; rather, the jury must find that the defendant intentionally chose the victim, and committed the crime because of the racial motivation. *Id.*

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[3] "[T]here may be an exception to the general rule that the preponderance standard satisfies due process when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction." *United States v. Restrepo*, 946 *F.*2d 654, 659 (9th Cir. 1991), *cert. denied*, 503 *U.S.* 961, 112 *S. Ct.* 1564, 118 *L. Ed.* 2d 211 (1992) (citation omitted). We need not decide today whether the enhancement of a ten-to-twenty year first-degree offense to life imprisonment under *N.J.S.A.* 2C:44-3(e) would offend due process. If a defendant has committed a first-degree crime and selected a victim for reasons of bias, the law provides ample remedies. *See State v. Crumb*, 307 *N.J. Super.* 204 (App. Div. 1997), *certif. denied*, 153 *N.J.* 215 (1998) (imposing sentence of life with a thirty-year parole ineligibility period for biased killing).

at 923; *see also Abbott v. State*, 705 *So.*2d 923 (1997) (explaining that it is insufficient to exhibit bias in the course of committing crime; rather actor must intentionally select victim because of victim's race, creed, color or ethnicity). The use of the term "because of" in a hate-crime statute "connotes a causal link between the infliction of injury and bias motivation. . . . " *Martinez v. State*, 980 *S.W.*2d 662, 667 (Tex. Ct. App. 1998 pet. ref'd).

There is one troubling aspect to this case. The trial court did not articulate the current statutory standard in sentencing. At the time of sentencing, although counsel was aware of the *Mortimer* decision, court and counsel were seemingly unaware of the then recent amendment to Section 44-3(e) that had excised, on the basis of *Mortimer*, the offending language concerning one having acted "at least in part" with ethnic bias or ill will in committing the crime. Although the issue of the court's articulation of the sentence is not before us on the basis of the dissent below, we are satisfied that no court could but conclude that the actor's purpose was, in fact, to intimidate the victims because of their color. The only question before the trial court was whether defendant's mental state, subjected to alcoholism, was such that he could not form the biased purpose. The trial court's review of the evidence submitted by defendant adequately disposed of that issue. There is no real question as to this actor's purpose in shooting into his neighbors' home.

In addition, we believe the sentence imposed was fair and just. Defendant was exposed to three charges of attempted murder and three charges of attempted aggravated assault with a weapon. If convicted of all counts he could have faced life in prison. His plea bargain exposed

him to a sentence of thirty-five years with a twelve-year ineligibility period. (Although the plea form recites a maximum of ten years on each weapon count, it was understood that one of these sentences could be enhanced.) Had unenhanced sentences on the two separate unlawful possession of weapons offenses been made consecutive, defendant would have been exposed to twenty years' imprisonment with six years of parole ineligibility. The sentence imposed was twelve years' imprisonment with four years of parole ineligibility. A satisfactory plea bargain afforded a fair and just resolution of the matter to the State and to defendant. We would not disturb the sentence in this case.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE PORITZ and JUSTICES POLLOCK, GARIBALDI, and COLEMAN join in JUSTICE O'HERN's opinion. JUSTICE STEIN has filed a separate dissenting opinion, in which JUSTICE HANDLER joins.

SUPREME COURT OF NEW JERSEY
A-164 September Term 1997

STATE OF NEW JERSEY,

Plaintiff-Plaintiff [sic],

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

STEIN, J., dissenting.

In *In re Winship*, 397 *U.S.* 358, 364, 90 *S. Ct.* 1068, 1073, 25 *L. Ed.* 2d 375 (1970), the United States Supreme Court explicitly held that "the Due Process Clause protects the accused [in a criminal proceeding] against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." This appeal requires this Court to apply the holding of *In re Winship* for the first time to one of the sentencing enhancement provisions of the Code of Criminal Justice, *N.J.S.A.* 2C:1-1 to 104-9, and to determine whether the Due Process Clause permits a judge, rather than a jury, to decide by a preponderance-of-the-evidence standard whether the sentencing enhancement factor has been proved.

The Court today affirms the judgment of the Appellate Division sustaining the constitutionality of *N.J.S.A.* 2C:44-3(e), pursuant to which the trial court is authorized to determine by a preponderance of the evidence that the Appellate Division defendant in committing the crimes with which he is charged acted "with a purpose to intimidate an individual or . . . individuals because of race,

color, gender, handicap, religion, sexual orientation or ethnicity." Based on that determination, the statute authorizes the court to sentence the defendant to an extended term of imprisonment. In effect, a trial court's finding that a defendant committed bias crimes pursuant to *N.J.S.A.* 2C:44-3(e) causes that defendant's offenses to be graded one degree higher for sentencing purposes: third-degree crimes are sentenced as second-degree crimes, second-degree crimes are sentenced as first-degree crimes, and first-degree crimes are subject to a sentence between twenty years' and life imprisonment. See *N.J.S.A.* 2C:43-7(a).

In my view, the critical determination required by the statute, that a defendant's mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof. Moreover, the significantly increased sentencing range triggered by that statute also persuades me that the finding of a purpose to intimidate must be treated as a material element of a defendant's crimes, and that the material element must be found by a jury beyond a reasonable doubt. Accordingly, I conclude that *N.J.S.A.* 2C:44-3(e) is unconstitutional because it permits the finding of a purpose to intimidate based on race to be made by a judge under a preponderance-of-the-evidence standard.

I

Defendant pled guilty to two counts of a twenty-two count indictment charging him with the second-degree

offense of possession of a firearm for the purpose of using it unlawfully on September 24 and December 22, 1994, *N.J.S.A.* 2C:39-4(a), and to one count charging him with the third-degree offense of knowing possession of a destructive device (an anti-personnel bomb), *N.J.S.A.* 2C:39-3(a). Defendant's plea was conditioned on the right to appeal his sentence. The State moved to have defendant sentenced to an extended term pursuant to *N.J.S.A.* 2C:44-3 which at the time of defendant's offenses provided:

> The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .
>
> e. The defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.
>
> [*Ibid. But see L.* 1995, *c.* 211, § 3, eff. Aug. 14, 1995 (amending text of statute to delete phrase "at least in part, with ill will, hatred or bias toward, and").]

The facts giving rise to defendant's indictment indicated that on September 24 and December 22, 1994, defendant fired shots into a home in his neighborhood in Vineland that was occupied by an African-American family. The September incident involved a single bullet shot through the window of a bedroom in which a nine-year-old child slept. On December 22, 1994, defendant fired eight rounds from a rifle through the front door of the

home. Because defendant's truck was observed driving away from the victims' house immediately after the shooting in December, police officers proceeded to defendant's home and took him into custody. After *Miranda* warnings were administered, defendant allegedly told police that he shot at the house because African-Americans lived there, stating that "he knew that there were black people who lived at that residence because he's seen them out in the yard. And he was giving them a message that they were in his neighborhood."

At his plea hearing defendant admitted that he shot at the victims' home on September 24, 1994 and December 22, 1994, and that he did so "for an unlawful purpose." He retracted that admission during the hearing conducted to determine whether he was subject to an extended term because he committed the crimes while acting with bias and to intimidate the victims because of their race. *N.J.S.A.* 2C:44-3(e). He denied knowing that an African-American family lived in the home and denied shooting at the home on the two occasions charged in the indictment. At the hearing character witnesses testified that defendant did not have a reputation in the community for being biased against African-Americans.

The court found that defendant committed the offenses while acting with bias and a purpose to intimidate the victims because of their race. The court sentenced defendant to twelve years' imprisonment with four years' parole ineligibility on one of the counts of possession of a firearm for an unlawful purpose, and to a seven-year term with three years' parole ineligibility on the other charge of possession of a firearm for an unlawful purpose. On the charge of possession of an anti-

personnel bomb, defendant was sentenced to three years' imprisonment. All sentences were concurrent. The court observed that defendant's sentence to less than the presumptive term for first-degree crimes was based on testimony indicating that he suffered from psychological problems and that his unlawful behavior was aberrational.

A divided panel of the Appellate Division upheld the constitutionality of *N.J.S.A.* 2C:44-3(e) and affirmed defendant's sentence. 304 *N.J. Super.* 147 (1997). Judge Wecker dissented, concluding that the statute was unconstitutional because it deprived defendant of a jury determination beyond a reasonable doubt on whether defendant had committed the charged offenses with a purpose to intimidate the victims because of their race. *Id.* at 161-67. Defendant appeals to this Court as of right. *R.* 2:2-1(a)(2).

II

Not only is the due process issue before us one of first impression for this Court, but its resolution is neither dictated nor clearly forecast by the handful of United States Supreme Court precedents that bear on the question.

The landmark decision is *In re Winship, supra,* in which the Supreme Court reviewed a delinquency determination by a New York Family Court judge who found that appellant, then a twelve-year-old boy, had stolen $112 from a woman's pocketbook. Acknowledging that the evidence might not establish guilt beyond a reasonable doubt, the court rejected the appellant's contention

that that standard of proof was mandated by the Fourteenth Amendment, and relied instead on a provision of the New York Family Court Act that authorized delinquency determinations to be based on a preponderance of the evidence. At a dispositional hearing appellant was placed in a training school for eighteen months, subject to annual extensions until his eighteenth birthday. *In re Winship, supra*, 397 *U.S.* at 359-60, 90 *S. Ct.* at 1070, 25 *L. Ed.* 2d at 372-73.

In an opinion by Justice Brennan, the Supreme Court took note of the longstanding common-law principle that required proof beyond a reasonable doubt to establish guilt of criminal charges:

> The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The "demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt." C. McCormick, *Evidence* § 321, pp. 681-82 (1954). Although virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does "reflect a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 *U.S.* 145, 155, 20 *L. Ed.* 2d 491, 499, 88 *S. Ct.* 1444 (1968).

> [*Id.* at 361-62, 90 *S. Ct.* at 1071, 25 *L. Ed.* 2d at 373-74 (alteration in original) (citation omitted).]

The Court also emphasized the practical and moral justifications for the requirement of proof beyond a reasonable doubt in criminal trials, holding expressly for the first time that that standard of proof was mandated by the Due Process Clause:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt." [quoting *Speiser v. Randall*, 357 *U.S.* 513, 525-26, 78 *S. Ct.* 1332, 1342, 2 *L. Ed.* 2d 1460, 1472-73 (1958).]. . . .
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . .
>
> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

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every fact necessary to constitute the crime with which he is charged.

> [*Id.* at 364, 90 *S. Ct.* at 1072-73, 25 *L. Ed.* 2d at 375.]

Reversing the New York Court of Appeals, the Supreme Court invalidated the New York statute permitting delinquency determinations to be based merely on a preponderance of the evidence. The Court stated:

> In sum, the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* – notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination. We therefore hold, in agreement with Chief Judge Fuld in dissent in the Court of Appeals, "that, where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process . . . the case against him must be proved beyond a reasonable doubt." 24 *N.Y.* 2d at 207, 299 *N.Y.S.* 2d at 423, 247 *N.E.* 2d at 260.
>
> [*Id.* at 368, 90 *S. Ct.* at 1075, 25 *L. Ed.* 2d at 377-78.]

The Supreme Court first had occasion to apply the *Winship* principle in *Mullaney v. Wilbur*, 421 *U.S.* 684, 95 *S. Ct.* 1881, 44 *L. Ed.* 2d 508 (1975), a case in which the defendant's trial and conviction of murder in Maine occurred approximately four years prior to the *Winship* decision. At that trial the defendant did not contest his responsibility for the homicide, but alleged that he had

acted in a frenzy provoked by the victim's homosexual advance. On that basis his counsel asserted that at most the homicide was manslaughter, having been committed in the heat of passion provoked by the victim's advances. The trial court instructed the jury that under Maine law murder and manslaughter are both subsets of homicide, and both offenses require the State to prove that the homicide was intentional and unjustifiable. The court further charged that malice aforethought, an essential element of murder, was to be conclusively implied unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. After requesting reinstruction on the doctrine of implied malice aforethought and on the meaning of "heat of passion," the jury convicted the defendant of murder. The Maine Supreme Judicial Court affirmed, *State v. Wilbur*, 278 A.2d 139 (1971), rejecting the contention that requiring defendant to prove that he acted in the heat of passion to overcome the presumption of malice aforethought was contrary to the due process protection afforded by *Winship*. *Mullaney, supra*, 421 *U.S.* at 687-88, 95 *S. Ct.* at 1883-84, 44 *L. Ed.* 2d at 513.

In an opinion by Justice Powell, the Supreme Court acknowledged that at common law the burden of proving heat of passion on sudden provocation was borne by the defendant, but noted that that approach had since been rejected by the Court, *Davis v. United States*, 160 *U.S.* 469, 16 *S. Ct.* 353, 40 *L. Ed.* 499 (1895), and by the majority of states. *Mullaney, supra*, 421 *U.S.* at 696, 95 *S. Ct.* at 1888, 44 *L. Ed.* 2d at 517-18. The Court also rejected Maine's contention that the holding of *Winship* applied only to the elements of a crime as defined by state law:

Moreover, if *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment. An extreme example of this approach can be fashioned from the law challenged in this case. Maine divides the single generic offense of felonious homicide into three distinct punishment categories – murder, voluntary manslaughter, and involuntary manslaughter. Only the first two of these categories require that the homicidal act either be intentional or the result of criminally reckless conduct. But under Maine law these facts of intent are not general elements of the crime of felonious homicide. Instead, they bear only on the appropriate punishment category. Thus, if petitioners' argument were accepted, Maine could impose a life sentence for any felonious homicide – even one that traditionally might be considered involuntary manslaughter – unless the defendant was able to prove that his act was neither intentional nor criminally reckless.

Winship is concerned with substance rather than this kind of formalism.

[*Id.* at 698-99, 95 *S. Ct.* at 1888-89, 44 *L. Ed.* 2d at 519-20 (citations omitted).]

Accordingly, the Court invalidated the Maine homicide statute, holding that in homicide prosecutions the State bears the burden of proving beyond a reasonable

doubt the absence of heat of passion on sudden provocation:

Maine law requires a defendant to establish by a preponderance of the evidence that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. Under this burden of proof a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter. We therefore hold that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case. Accordingly, the judgment below is reversed.

[*Id.* at 703-04, 95 *S. Ct.* at 1892, 44 *L. Ed.* 2d at 522 (citations omitted).]

In *Patterson v. New York*, 432 *U.S.* 197, 97 *S. Ct.* 2319, 53 *L. Ed.* 2d 281 (1977), the Court, in a 5-3 vote, qualified its holding in *Mullaney* by sustaining a New York statute that defined second-degree murder as "causing the death of another person with intent to do so" and placing on the defendant the burden of proving by a preponderance of the evidence the affirmative defense of extreme emotional disturbance. In *Patterson* the defendant, estranged from his wife, observed through a window that she was partially unclothed in the presence of the victim. He entered the house with a rifle, killing the victim with two shots to the head. Patterson was charged with second-

degree murder which, under New York law, required proof only of "intent to cause the death of another person" and "caus[ing] the death of such person or of a third person." N.Y. Penal Law § 125.25 (McKinney 1975). Unlike the Maine statute at issue in *Mullaney*, malice aforethought was not an element of second-degree murder under New York law. The statute provided as an affirmative defense that the accused acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," *ibid.*, and the trial court instructed the jury that the defendant had the burden of proving that defense by a preponderance of the evidence. The court further instructed the jury that if the defendant established that affirmative defense, it must convict him of manslaughter rather than murder. The jury convicted Patterson of murder. The New York Court of Appeals sustained the conviction against a due process challenge, 347 *N.E.*2d 898 (N.Y. 1976), distinguishing *Mullaney* on the basis that the New York statute did not shift to the defendant the burden of disproving any fact essential to establishing the elements of second-degree murder. *Patterson, supra*, 432 *U.S.* at 198-200, 97 *S. Ct.* at 2321-22, 53 *L. Ed.* 2d at 284-86.

In an opinion by Justice White, the Court upheld the New York statute on the basis that it imposed on the State the burden of proving all elements of the offense beyond a reasonable doubt.

> We cannot conclude that Patterson's conviction under the New York law deprived him of due process of law. The crime of murder is defined by the statute, which represents a recent revision of the state criminal code, as causing

> the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. The statute does provide an affirmative defense – that the defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation – which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter, an offense defined in a separate section of the statute. . . .
>
> Here, the jury was instructed in accordance with the statute, and the guilty verdict confirms that the State successfully carried its burden of proving the facts of the crime beyond a reasonable doubt. Nothing in the evidence, including any evidence that might have been offered with respect to Patterson's mental state at the time of the crime, raised a reasonable doubt about his guilt as a murderer; and clearly the evidence failed to convince the jury that Patterson's affirmative defense had been made out. It seems to us that the State satisfied the mandate of *Winship* that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."
>
> [*Id.* at 205-206, 97 *S. Ct.* at 2324-25, 53 *L. Ed.* 2d at 289 (alteration in original) (citation omitted).]

The Court also observed that New York was not constitutionally compelled to disprove the availability of affirmative defenses to murder:

It is also very likely true that fewer convictions of murder would occur if New York were required to negative the affirmative defense at issue here. But in each instance of a murder conviction under the present law, New York will have proved beyond a reasonable doubt that the defendant has intentionally killed another person, an act which it is not disputed the State may constitutionally criminalize and punish. If the State nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonably [sic] certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.

> [*Id.* at 209, 97 *S. Ct.* at 2326, 53 *L. Ed.* 2d at 291.]

Finally, the Court distinguished *Mullaney* on the basis that the New York statute, unlike the Maine statute, did not presume an element of the crime unless rebutted by the defendant. Distinguishing the Maine statute at issue in *Mullaney*, the Court noted that

> [p]remeditation was not within the definition of murder; but malice, in the sense of the absence of provocation, was part of the definition of that crime. Yet malice, i.e., lack of provocation, was presumed and could be rebutted by the defendant only by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation. In *Mullaney* we held

> that however traditional this mode of proceeding might have been, it is contrary to the Due Process Clause as construed in *Winship*.
>
> As we have explained, nothing was presumed or implied against Patterson; and his conviction is not invalid under any of our prior cases.
>
> [*Id.* at 215-16, 97 *S. Ct.* at 2330, 53 *L. Ed.* 2d at 295.]

Justice Powell, in a dissenting opinion joined by Justices Brennan and Marshall, sharply criticized what he characterized as the Court's formalistic distinctions between *Mullaney* at *Patterson*:

> Perhaps the Court's interpretation of *Winship* is consistent with the letter of the holding in that case. But little of the spirit survives. Indeed, the Court scarcely could distinguish this case from *Mullaney* without closing its eyes to the constitutional values for which *Winship* stands. As Mr. Justice Harlan observed in *Winship*, "a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." Explaining *Mullaney*, the Court says today, in effect, that society demands full confidence before a Maine factfinder determines that heat of passion is missing – a demand so insistent that this Court invoked the Constitution to enforce it over the contrary decision by the State. But we are told that society is willing to tolerate far less confidence in New York's factual determination of precisely the same functional issue. One must ask what possibly could explain this difference in societal

demands. According to the Court, it is because Maine happened to attach a name – "malice aforethought" – to the absence of heat of passion, whereas New York refrained from giving a name to the absence of extreme emotional disturbance.

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship.

> [*Id.* at 223-24, 97 *S. Ct.* at 2334, 53 *L. Ed.* 2d at 300-01 (citations omitted).]

Nine years after its decision in *Patterson*, the Supreme Court revisited the *Winship* issue in *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S. Ct.* 2411, 91 *L. Ed.* 2d 67 (1986). *McMillan* concerned the constitutionality under the Due Process Clause and the Sixth Amendment's jury trial guarantee of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Cons. Stat. § 9712 (1982) (Act). That Act provides that any person convicted of certain enumerated felonies must be sentenced to a minimum of five years' imprisonment if the sentencing judge determines, based on a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. However, the Act does not permit imposition of a sentence greater than that otherwise authorized for the underlying offense.

Each of the petitioners in *McMillan* was convicted of one of the enumerated felonies under the Act, and in all four cases the Commonwealth gave notice of its intent to proceed under the Act's mandatory sentencing provisions. No hearings were held, however, because the sentencing judges found the Act unconstitutional. The Supreme Court of Pennsylvania consolidated the four appeals and held that the Act did not violate the due process guarantee, *Commonwealth v. Wright*, 494 *A.*2d 354 (Pa. 1985), rejecting petitioners' contention that visible possession of a firearm is an element of each felony that must be proved beyond a reasonable doubt. *McMillan, supra*, 477 *U.S.* at 81-84, 106 *S. Ct.* at 2413-15, 91 *L. Ed.* 2d at 73-75.

The Supreme Court affirmed 5-4, in an opinion authored by then Justice Rehnquist. Relying primarily on its decision in *Patterson*, the Court emphasized the significance of the State's definition of the elements of a crime in applying the *Winship* principle:

> *Patterson* stressed that in determining what facts must be proved beyond a reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive: "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged." *Id.*, at 210, 97 *S. Ct.* at 2327 (emphasis added). While "there are obviously constitutional limits beyond which the States may not go in this regard," *ibid.*, "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case," *id.*, at 211, n.12, 97 *S. Ct.* at 2327.

[*Id.* at 85, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 75 (alteration in original).]

Although acknowledging the existence of constitutional limits on a state's power to define the elements of an offense for due process purposes, the *McMillan* majority concluded that the Pennsylvania statute did not exceed those limits, and offered three justifications for that conclusion. First, unlike in *Mullaney*, the Act did not create an impermissible presumption relieving the prosecutor of the burden of proving an element of the offense. Second, the statute did not increase the maximum sentence beyond that imposed for violation of the underlying offense. Third, the statute did not appear to represent a legislative attempt to evade the reasonable doubt requirement. *Id.* at 86-89, 106 *S. Ct.* at 2416-18, 91 *L. Ed.* 2d at 76-78.

Dissenting, Justice Marshall, joined by Justices Brennan and Blackmun, rejected the majority's thesis and emphasized that "[w]hether a particular fact is an element of a criminal offense that, under *In re Winship*, must be proved by the prosecution beyond a reasonable doubt is a question that must be decided by this Court and cannot be abdicated to the States." *Id.* at 93, 106 *S. Ct.* at 2420, 91 *L. Ed.* 2d at 81 (Marshall, J., dissenting) (citation omitted).

In a separate dissent, Justice Stevens, who joined the majority in *Patterson*, rejected the majority's assertion that courts should defer to a state legislature's definition of a crime in determining the application of due process protections:

> Today the Court holds that state legislatures may not only define the offense with which a criminal defendant is charged, but may also authoritatively determine that the conduct so described – i.e., the prohibited activity which subjects the defendant to criminal sanctions – is *not* an element of the crime which the Due Process Clause requires to be proved by the prosecution beyond a reasonable doubt. In my view, a state legislature may not dispense with the requirement of proof beyond a reasonable doubt for conduct that it targets for severe criminal penalties. Because the Pennsylvania statute challenged in this case describes conduct that the Pennsylvania Legislature obviously intended to prohibit, and because it mandates lengthy incarceration for the same, I believe that the conduct so described is an element of the criminal offense to which the proof beyond a reasonable doubt requirement applies.
>
> Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt.
>
> [*Id.* at 96, 106 *S. Ct.* at 2421, 91 *L. Ed.* 2d at 83 (Stevens, J., dissenting).]

Distinguishing *Patterson*, Justice Stevens characterized that holding as upholding a state's refusal to " 'prove beyond a reasonable doubt every fact, the existence or nonexistence of which it [was] willing to recognize as an *exculpatory or mitigating circumstance* affecting the degree of culpability or the severity of the punishment' – in that case, the affirmative defense of extreme emotional disturbance." *Id.* at 99, 106 *S. Ct.* at 2423, 91 *L. Ed.* 2d at 84-85

(quoting *Patterson, supra*, 432 *U.S.* at 207, 97 *S. Ct.* at 2325, 53 *L. Ed.* 2d at 290 (Stevens, J., dissenting)). Justice Stevens distinguished the "aggravating fact" of visible possession of a firearm from the "mitigating fact" implicated by *Patterson*, noting that

> although States may reach the same destination either by criminalizing conduct and allowing an affirmative defense, or by prohibiting lesser conduct and enhancing the penalty, legislation proceeding along these two paths is very different even if it might theoretically achieve the same result.
>
> [*McMillan, supra*, 477 *U.S.* at 100, 106 *S. Ct.* at 2424, 91 *L. Ed.* 2d at 85-86 (Stevens, J., dissenting).]

Accordingly, Justice Stevens asserted that irrespective of the Pennsylvania Legislature's assertion that visible possession of a firearm is not an element of the offenses subject to the Act, the Due Process Clause requires that fact to be proved by the State beyond a reasonable doubt:

> Appropriate respect for the rule of *In re Winship* requires that there be some constitutional limits on the power of a State to define the elements of criminal offenses. The high standard of proof is required because of the immense importance of the individual interest in avoiding both the loss of liberty and the stigma that results from a criminal conviction. It follows, I submit, that if a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a "fact necessary to constitute the crime" within the meaning of our holding in *In re Winship*.
>
> [*Id.* at 103, 106 *S. Ct.* at 2425, 91 *L. Ed.* 2d at 87 (Stevens, J., dissenting).]

More than a decade after its decision in *McMillan* the Supreme Court again confronted the *Winship* issue in *Almendarez-Torres v. United States*, 523 *U.S.* 224, 118 *S. Ct.* 1219, 140 *L. Ed.* 2d 350 (1998). The statute at issue in *Almendarez-Torres* was 8 *U.S.C.A.* § 1326. Subsection (a) of that statute authorizes a prison term of up to two years for any previously deported alien who returns to the United States without special permission. Subsection (b)(2) of the statute authorizes a prison term of up to twenty years for "any alien described" in subsection (a) whose initial "deportation was subsequent to a conviction for commission of an aggravated felony." The question before the Court was whether subsection (b)(2) defines a separate crime the elements of which would have to be proved beyond a reasonable doubt, or simply authorizes an enhanced penalty. By a 5-4 vote, the Court concluded that subsection (b)(2) "is a penalty provision, which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." 523 *U.S.* at ___, 118 *S. Ct.* at 1222, 140 *L. Ed.* 2d at 357.

Petitioner Almendarez-Torres pled guilty to a federal indictment charging that he had been found in the United States after having been deported in violation of 8 *U.S.C.A.* § 1326. At his plea hearing he admitted that his earlier deportation had occurred on the basis of three earlier convictions for aggravated felonies. At his sentencing hearing, petitioner contended that his maximum sentence was two years because the indictment made no

mention of his aggravated felony convictions. The District Court rejected that contention and imposed an eighty-five-month sentence. The Fifth Circuit Court of Appeals affirmed.

In affirming the lower courts, the Supreme Court initially relied on *McMillan, supra*, for the principle that legislative intent determines whether a provision in a criminal statute is an element of a crime or a sentencing enhancer, *id.* at ___, 118 *S. Ct.* at 1223, 140 *L. Ed.* 2d at 358, and concluded after reviewing the statutory provisions at issue and their legislative history that "Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense." *Id.* at ___, 118 *S. Ct.* at 1226, 140 *L. Ed.* 2d at 363.

Next, the Court addressed the doctrine of "constitutional doubt," relied on by the dissenting Justices to support their view that the statute should be construed in a manner that avoided grave doubts concerning its constitutionality. The majority opinion declined to apply the doctrine:

> That is because the "constitutional doubt" doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious. And precedent makes clear that the Court need not apply . . . the doctrine in circumstances similar to those here – where a constitutional question, while lacking an obvious answer, does not lead a majority gravely to doubt that the statute is constitutional.
>
> [*Id.* at ___, 118 *S. Ct.* at 1227, 140 *L. Ed.* 2d at 365.]

Finally, the Court rejected the contention that its emphasis in *McMillan* on the fact that the statute there did not "alter[ ] the maximum penalty for the crime," 477 *U.S.* at 87, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77, required a different result in *Almendarez-Torres* where the statute increased the maximum sentence tenfold. The Court emphasized that "the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Almendarez-Torres, supra*, 523 *U.S.* at ___, 118 *S. Ct.* at 1230, 140 *L. Ed.* 2d at 368. In addition, the Court noted that the mandatory minimum sentence at issue in *McMillan* could be more disadvantageous to a criminal defendant than an increase in the maximum sentence because the former is binding on a sentencing judge whereas the latter is not. Accordingly, the Court rejected the contention that a statutory provision that increases the maximum permissible sentence necessarily constitutes an element of the crime. *Id.* at ___, 118 *S. Ct.* at 1231, 140 *L. Ed.* 2d at 369-70.

Dissenting, Justice Scalia sharply criticized the majority's rejection of the "constitutional doubt" doctrine and its reliance on recidivism as a basis for distinguishing the concern expressed in *McMillan* about statutes that increase the maximum permissible sentence:

> But this parsing of various factors is really beside the point. No one can read our pre-*McMillan* cases, and especially *Mullaney* (whose limits were adverted to in *Patterson* but never precisely described) without entertaining a serious doubt as to whether the statute as interpreted by the Court in the present case is constitutional. And no one can read *McMillan*,

our latest opinion on the point, without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge's discretion within the range of penalty already available, rather than substantially increasing the available sentence. And even more than that: No one can read *McMillan* without learning that the Court was open to the argument that the Constitution requires a fact which does increase the available sentence to be treated as an element of the crime (such an argument, it said, would have "at least . . . superficial appeal," 477 *U.S.*, at 88, 106 *S. Ct.*, at 2417). If all that were not enough, there must be added the fact that many State Supreme Courts have concluded that a prior conviction which increases maximum punishment must be treated as an element of the offense under either their state constitutions, or as a matter of common law.

In the end, the Court cannot credibly argue that the question whether a fact which increases maximum permissible punishment must be found by a jury beyond a reasonable doubt is an easy one. That, perhaps, is why the Court stresses, and stresses repeatedly, the limited subject matter that § 1326(b) addresses – recidivism. It even tries, with utter lack of logic, to limit its rejection of the fair reading of *McMillan* to recidivism cases. "For the reasons just given," it says, "and in light of the particular sentencing factor at issue in this case – recidivism – we should take McMillan's statement [regarding the "superficial appeal" the defendant's argument would have had if the factor at issue increased his maximum sentence] to mean no more than

what it said, and therefore not to make a determinative difference here." *Ante* at 1231 (emphasis added). It is impossible to understand how *McMillan* could mean one thing in a later case where recidivism is at issue, and something else in a later case where some other sentencing factor is at issue. One might say, of course, that recidivism should be an exception to the general rule set forth in *McMillan* – but that more forthright characterization would display how doubtful the constitutional question is in light of our prior case law.

. . . .

What I have tried to establish – and all that I need to establish – is that on the basis of our jurisprudence to date, the answer to the constitutional question is not clear. It is the Court's burden, on the other hand, to establish that its constitutional answer shines forth clearly from our cases. That burden simply cannot be sustained. I think it beyond question that there was, until today's unnecessary resolution of the point, "serious doubt" whether the Constitution permits a defendant's sentencing exposure to be increased tenfold on the basis of a fact that is not charged, tried to a jury, and found beyond a reasonable doubt. If the Court wishes to abandon the doctrine of constitutional doubt, it should do so forthrightly, rather than by declaring certainty on a point that is clouded in doubt.

[*Id.* at ___-___, 118 *S. Ct.* at 1237-38, 140 *L. Ed.* 2d at 376-79 (citations omitted).]

The Supreme Court again confronted the *Winship* issue this term in *Jones v. United States*, ___ *U.S.* ___, 119 *S. Ct.* 1215, ___ *L. Ed.* 2d ___ (1999). The issue in *Jones*

involved the federal carjacking statute, 18 *U.S.C.A.* § 2119, and specifically considered whether the enhanced sentencing provisions of that statute should be treated as distinct offenses requiring inclusion in the indictment and proof of the criteria for enhanced sentencing beyond a reasonable doubt.

Jones and two accomplices held up two victims and stole their automobile. In the course of the carjacking one of Jones's accomplices stuck his gun in the left ear of one victim and then struck him on the head. Jones was apprehended when he crashed the stolen car into a telephone pole.

Jones and his accomplices were indicted for violation of the federal carjacking statute, 18 *U.S.C.A.* § 2119, which then read as follows:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall –
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.

Neither the indictment nor the District Court's jury instructions contained any reference to serious bodily

injury or any facts relating to the victim's injuries. The jury convicted Jones of the carjacking offense and of aiding and abetting the use of a firearm in relation to a crime of violence. See 18 *U.S.C.A.* § 924(c).

The presentence report, however, recommended that Jones be sentenced to twenty-five years' imprisonment on the basis that one of the victims sustained a perforated eardrum and permanent hearing loss, constituting serious bodily injury for purposes of the carjacking statute. Jones objected, contending that serious bodily injury was an element of the crime that had neither been charged in the indictment nor proved beyond a reasonable doubt to the jury. The District Court concluded that serious bodily injury was merely a sentencing factor and imposed a twenty-five-year sentence on the carjacking count on the basis that serious bodily injury was established by a preponderance of the evidence. The District Court also sentenced Jones to a consecutive five-year sentence for the firearm offense. The Ninth Circuit Court of Appeals affirmed, *United States v. Oliver*, 60 *F.*3d 547 (1995), but remanded for resentencing on other grounds.

In a 5-4 decision, the Supreme Court reversed, construing the statute to define three distinct offenses in reliance on the established rule that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." ___ *U.S.* at ___, 119 *S. Ct.* at 1222, ___ *L. Ed.* 2d at ___ (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 *U.S.* 366, 408, 29 *S. Ct.* 527, 536, 53 *L. Ed.* 836, 849 (1909)). The Court first examined the structure of the carjacking statute and its

legislative history, as well as comparable federal criminal statutes, and concluded on the basis of that examination that "Congress probably intended serious bodily injury to be an element defining an aggravated form of the crime." ___ *U.S.* at ___, 119 *S. Ct.* at 1221, ___ *L. Ed.* 2d at ___. The Court also reviewed the post-*Winship* decisional law, emphasizing the question raised in *McMillan* whether "judicial factfinding by a preponderance [may] support the application of a provision that increases the potential severity of the penalty for a variant of a given crime," as well as "*Mullaney*'s insistence that a State cannot manipulate its way out of *Winship*," and "*Patterson*'s recognition of a limit on state authority to reallocate traditional burdens of proof." *Id.* at ___, 119 *S. Ct.* at 1224, ___ *L. Ed.* 2d at ___.

Responding to the dissent's challenge to state with precision the principle underlying the majority's view that the carjacking statute, as applied by the District Court, may violate the Constitution, the Court explained:

> The preceding paragraph in the text expresses that principle plainly enough, and we re-state it here: under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

> [*Id.* at ___ n.6, 119 *S. Ct.* at 1224 n.6, ___ *L. Ed.* 2d at ___ n.6.]

Concurring, Justices Stevens and Scalia both expressed the belief that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at ___-___, 119 *S. Ct.* at 1228, ___ *L. Ed.* 2d at ___ (Stevens, J., concurring).

Justice Kennedy, dissenting, expressed the view that the Court's holding in *Almendarez-Torres* was controlling notwithstanding that the sentencing factor implicated there was recidivism, and predicted that the Court's holding would have a significant impact on state sentencing statutes:

> [T]he Court is eager to find controlling significance in the fact that the statute at issue in *Almendarez-Torres* made recidivism a sentencing factor, while the sentencing factor at issue here is serious bodily injury. This is not a difference of constitutional dimension, and *Almendarez-Torres* does not say otherwise. It is true that our statutory analysis was informed in substantial measure by the fact that recividism is a common sentencing factor. *Id.* at 230. In our constitutional analysis we invoked the long history of using recidivism as a basis for increasing an offender's sentence to illustrate the novel and anomalous character of the petitioner's proposed constitutional rule – i.e., that under *McMillan v. Pennsylvania* any factor that increases the maximum penalty for a crime must be deemed an element of the offense. We proceeded to reject that rule. *Almendarez-Torres v. United States*, 523 *U.S.* at 247.

. . . .

The rationale of the Court's constitutional doubt holding makes it difficult to predict the full consequences of today's holding, but it is likely that it will cause disruption and uncertainty in the sentencing systems of the States. Sentencing is one of the most difficult tasks in the enforcement of the criminal law. In seeking to bring more order and consistency to the process, some States have sought to move from a system of indeterminate sentencing or a grant of vast discretion to the trial judge to a regime in which there are more uniform penalties, prescribed by the legislature. See A. Campbell, *Law of Sentencing* §§ 1:3, 4:6-4:8 (2d ed.1991). These States should not be confronted with an unexpected rule mandating that what were once factors bearing upon the sentence now must be treated as offense elements for determination by the jury. *This is especially so when, as here, what is at issue is not the conduct of the defendant, but the consequences of a completed criminal act.*

[*Id.* at ___, 119 *S. Ct.* at 1236-38, ___ *L. Ed.* 2d at ___ (emphasis added).]

III

As the Court's opinion explains, *ante* at ___ (slip op. at 6-7), between the date of defendant's offenses and the date of his sentence the Legislature, in response to our decision in *State v. Mortimer*, 135 *N.J.* 517, *cert. denied*, 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994), amended *N.J.S.A.* 2C:44-3(e) to delete the words, "at least in part with ill will, hatred or bias toward the victim." *L.* 1995, *c.* 211. As amended, that statute provides in part:

2C:44-3 Criteria for sentence of extended term of imprisonment

The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e.

. . .

e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

The Appellate Division majority, in sustaining the constitutionality of *N.J.S.A.* 2C:44-3(e), concluded that defendant's purpose to intimidate the victims because of their race related only to his motive, not to his criminal intent, and therefore did not implicate an element of the crime. 304 *N.J. Super.* at 157-58. The Court's opinion firmly rejects that distinction, acknowledging that "in ordinary circumstances proof of motive does not increase the penal consequences to an actor." *Ante* at ___ (slip op. at 20.) The Court also observes that the 1995 amendment to the statute "limits our ability to view this finding as merely a search for motive. We must search for firmer principles of decision." *Ibid.*

The Court's acknowledgment that a defendant's alleged purpose to intimidate his victims because of their race involves not merely motive but an aspect of criminal intent serves to distinguish the issue in this appeal from those that most recently divided the United States

Supreme Court in *Almendarez-Torres* and *Jones*. In *Almendarez-Torres*, the sentencing factor was recidivism, a factor unrelated to the defendant's purpose in committing the charged offense. In *Jones*, the sentencing factor at issue was whether serious bodily injury resulted from a carjacking, which also was unrelated to the defendant's intent in committing the underlying offense of carjacking. The significance of that distinction was emphasized by Justice Kennedy, writing for the four dissenters in *Jones*, who criticized the majority for treating "serious bodily injury" as an element of the offense: "This is especially so when, as here, what is at issue is not the conduct of the defendant, but the consequences of a completed act." *Jones, supra*, ___ *U.S.* at ___, 119 *S. Ct.* at 1238, ___ *L. Ed.* 2d at ___ (Kennedy, J., dissenting).

Unlike *Almendarez-Torres* and *Jones*, the sentencing enhancement at issue here does involve the *conduct* of the defendant, as the definition of conduct in the Code of Criminal Justice (Code) makes clear: " 'Conduct' means an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions." *N.J.S.A.* 2C:1-14(d). Directly related to the Code's definition of "conduct" is its definition of "element of an offense":

> "Element of an offense" means (1) such conduct or (2) such attendant circumstances or (3) such a result of conduct as
>
> (a) Is included in the description of the forbidden conduct in the definition of the offense;
>
> (b) Establishes the required kind of culpability;

> (c) Negatives an excuse or justification for such conduct;
>
> (d) Negatives a defense under the statute of limitations; or
>
> (e) Establishes jurisdiction or venue.
>
> [*N.J.S.A.* 2C:1-14(h).]

Our understanding of the Code's conception of an "element of an offense" also is informed by *N.J.S.A.* 2C:2-2, entitled "General requirements of culpability." That provision states generally that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense." *N.J.S.A.* 2C:2-2(a). The Code defines purposely, the state of mind referred to in *N.J.S.A.* 2C:44-3(e), as follows: "A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." *N.J.S.A.* 2C:2-2(b)(1).

As the Supreme Court emphasized in *Mullaney, supra*, the due process protections afforded by the Court's holding in *Winship* cannot be undermined by states redefining the elements of crimes and characterizing essential factors as bearing only on sentencing. *Mullaney, supra*, 421 *U.S.* at 698-99, 95 *S. Ct.* at 1889-90, 44 *L. Ed.* 2d at 519-20. Accordingly, although defendant pled guilty to the second-degree crime of possession of a firearm for the purpose of using it unlawfully, *N.J.S.A.* 2C:39-4(a), pursuant to *N.J.S.A.* 2C:44-3(e) he was subject to sentencing as a first-degree offender if he committed that offense with a purpose to intimidate the victims because of their race.

Under the Code, defendant would have acted "purposely" if his conscious object in possessing and using the firearm was to intimidate the victims because of their race. *N.J.S.A.* 2C:2-2(b)(1). Such conduct, combined with defendant's purposeful state of mind, would constitute an element of the offense if it "establishe[d] the required kind of culpability." *N.J.S.A.* 2C:1-14(h)(b). As the dissenting judge observed below, *N.J.S.A.* 2C:44-3(e) requires proof of a purpose to intimidate because of race in order to "establish[ ] the required kind of culpability." 304 *N.J. Super.* at 165 (Wecker, J., dissenting). In my view, a fair reading of the Code's conception of an element of an offense demonstrates that conduct, accompanied by a purpose to intimidate because of race, embodies those characteristics that qualify unmistakably as an "element of an offense," and therefore is subject to the Code's mandate that "[n]o person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt." *N.J.S.A.* 2C:1-13(a).

The foregoing statutory analysis demonstrates that the Legislature's inclusion of a preponderance-of-the-evidence standard of proof in *N.J.S.A.* 2C:44-3(e) is structurally inconsistent with those basic provisions of the Code that define conduct, mental states, and elements of an offense. As a matter of statutory interpretation, I would invalidate *N.J.S.A.* 2C:44-3(e) to the extent that it purports to treat a defendant's purpose to intimidate because of race as a sentencing enhancement rather than as an element of an offense.

I also conclude that *N.J.S.A.* 2C:44-3(e) is unconstitutional under the Due Process Clause of the Fifth Amendment, and under the Sixth Amendment's notice and jury

trial guarantees, based on the United States Supreme Court decision in *Winship, supra,* and its progeny, and that it violates as well Article 1, Paragraph 1 of the New Jersey Constitution. See *Greenberg v. Kimmelman,* 99 *N.J.* 552, 568 (1985) (noting that Article 1, Paragraph 1 of New Jersey Constitution encompasses principles of due process and equal protection). The Supreme Court's jurisprudence on the *Winship* issue reflects the sharp divisions on that Court and the absence of a clear standard limiting the power of legislative bodies to delegate to a sentencing judge under a preponderance-of-the-evidence standard the determination of whether a sentencing enhancement factor has been established. Notwithstanding the analytical tensions and imprecision reflected by the Supreme Court precedents, there can be little doubt that the sentencing factor applied to this defendant – the purpose to intimidate a victim because of race – must fairly be regarded as an element of the crime requiring inclusion in the indictment and proof beyond a reasonable doubt. *N.J.S.A.* 2C:44-3(e) permits the sentencing judge, based on the statutory sentencing factor, to sentence a defendant as if the crime committed were one degree higher, potentially doubling the sentencing exposure for many defendants and, in the case of a first-degree offender, increasing that defendant's exposure from a ten-to-twenty-year range to life imprisonment. The Court expressly declines to decide whether that enhancement would offend due process, *ante* at ___ (slip op. at 31 n.2), but its reluctance to approve that level of enhancement demonstrates its discomfort with the concept that a critical determination of an aspect of culpability materially affecting a defendant's term of imprisonment would not

be found by a jury beyond a reasonable doubt. Unquestionably, the sentencing enhancement authorized by *N.J.S.A.* 2C:44-3(e) meets the standard of the constitutional principle that induced the Supreme Court to reverse in the *Jones* case. See *Jones, supra,* ___ *U.S.* at ___ n.6, 119 *S. Ct.* at 1224 n.6, ___ *L. Ed.* 2d at ___ n.6.

The Court's opinion attempts to reconcile *N.J.S.A.* 2C:44-3(e) with the Supreme Court precedents by analogizing defendant's biased purpose to recidivism:

> [T]he Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis, is a very traditional sentencing factor.
>
> [*Ante* at ___ (slip op. at 26).]

The difference, however, is glaring. The factor of recidivism is readily determined on the basis of the official court record of a prior conviction; it involves no inquiry into the defendant's conduct in perpetrating the current offense; and recidivism, of course, involves no inquiry in connection with the defendant's mental state in committing the current offense. Neither the *Jones* case, in which the sentencing factor was serious bodily injury to a carjacking victim, nor *McMillan,* in which the sentencing factor was visible possession of a firearm in the course of committing various felonies, required the sentencer to make findings of fact, such as are required by *N.J.S.A.* 2C:44-3(e), about the mental state of a defendant when he committed the subject offense. Because under our Code a finding that a defendant possessed the requisite mental

state is indispensable to a conviction, *N.J.S.A.* 2C:2-2, there simply can be no doubt that defendant's purpose to intimidate these victims because of their race must be regarded as a material element of the charged offenses.

The Court correctly cautions that if a defendant's purpose to intimidate based on race were an element of his criminal offense, that could "create[ ] an added risk of prejudice for defendants. It would open trials to evidence of former acts of bias on the part of the actor." *Ante* at ___ (slip op. at 29). That concern is a significant one and undoubtedly could be addressed by implementing a variant of the procedure we followed in *State v. Ragland,* 101 *N.J.* 33 (1985), *reconsidered,* 105 *N.J.* 189 (1986). The defendant in *Ragland* was charged with unlawful possession of a weapon and possession of a weapon by a convicted felon. We held that the "two charges must be tried separately since proof that defendant was a convicted felon (required in the trial of the latter charge) clearly tends to prejudice the jury in considering the former." 105 *N.J.* at 193. That procedure was followed in *Ragland* using the same jury. That jury first tried the unlawful possession charge and then tried the charge of possession by a convicted felon. *Id.* at 195. That procedure could be adapted to the charges against defendant, resulting in the same jury first trying the possession offenses and subsequently deliberating on the charge that the possessory offenses were committed with a purpose to intimidate the victims because of their race.

IV

The principle that fortifies my conclusion that defendant's convictions and sentence must be reversed because of the unconstitutionality of *N.J.S.A.* 2C:44-3(e) was simply and eloquently expressed by Justice Brennan in *Winship* and bears repetition here:

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. . . .
>
> [*In re Winship, supra*, 397 *U.S.* at 364, 90 *S. Ct.* at 1072-73, 25 *L. Ed.* 2d at 375.]

Accordingly, I would reverse the judgment of the Appellate Division and remand the matter for a new trial consistent with this opinion.

Justice Handler joins in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-164 SEPTEMBER TERM 1997

ON APPEAL FROM Appellate Division, Superior Court

ON CERTIFICATION TO _____

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

DECIDED June 24, 1999

Chief Justice Poritz PRESIDING

OPINION BY Justice O'Hern

CONCURRING OPINION BY _____

DISSENTING OPINION BY Justice Stein

CHECKLIST	AFFIRM	REVERSE & REMAND
CHIEF JUSTICE PORITZ	X	
JUSTICE HANDLER		X
JUSTICE POLLOCK	X	
JUSTICE O'HERN	X	
JUSTICE GARIBALDI	X	
JUSTICE STEIN		X
JUSTICE COLEMAN	X	
TOTALS	5	2

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APEALLTE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
A-1587-95T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

APPROVED FOR PUBLICATION

AUG 19 1997

APPELLATE DIVISION

WECKER, J.S.C., (temporarily assigned) dissenting.

I dissent from the majority's affirmance of defendant's extended term sentence under *N.J.S.A.* 2C:44-3e. Section e of 2C:44-3 was enacted as part of the so-called "bias crime" law. L. 1990, c. 87, § 4.[1] Section e was incorporated into the Code of Criminal Justice as a sentencing enhancement provision, not as an element of the offense, and mandates an extended term if requested by the prosecutor and if the sentencing judge finds by a preponderance of the evidence that

> [t]he defendant in committing the crime acted[, at least in part, with ill will, hatred or bias

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[1] Section 1 of this legislation added similar language to *N.J.S.A.* 2C:12-1e (assault), and § 2 added similar language to *N.J.S.A.* 2C:33-4d (harassment).

> toward, and][2] with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.[3]
>
> [*N.J.S.A.* 2C:44-3e.]

I disagree with the majority's conclusion that it is permissible to treat a defendant's purpose in committing a crime as a mere sentencing factor rather than as an element of the crime itself. To do so is to deprive the defendant of two fundamental constitutional rights: the right to trial by jury[4] and the right to be convicted of a crime only upon proof of guilt beyond a reasonable doubt.[5] Those guarantees are at the heart of our constitutional system of government. *See, e.g., State v. Medina*, 147 *N.J.* 43, 49-50 (1996), *cert. denied*, ___ *U.S.* ___, 117 *S.Ct.* 1476, 137 *L. Ed.* 2d 688 (1997); *State v. Anderson*, 127 *N.J.* 191, 199-201 (1992). The Legislature has incorporated those guarantees into the Code of Criminal Justice. *N.J.S.A.* 2C:1-13a.

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[2] The bracketed portion was deleted, after the offense for which defendant was convicted, by L. 1995, c. 211, § 3, in response to *R.A.V. v. City of St. Paul*, 505 *U.S.* 377, 112 *S.Ct.* 2538, 120 *L. Ed.* 2d 305 (1992). *See also State v. Mortimer*, 135 *N.J.* 517, 529 (1993), *cert. denied*, 513 *U.S.* 970, 115 *S.Ct.* 440, 130 *L. Ed.* 2d 351 (1994).

[3] Gender and handicap were added by L. 1995, c. 211, § 3.

[4] *U.S. Const.*, amends. VI and XIV; *N.J. Const.*, art. I, ¶¶ 9, 10.

[5] *See, e.g., In re Winship*, 397 *U.S.* 358, 364, 90 *S.Ct.* 1068, 1073, 25 *L.Ed.*2d 368, 375 (1970) (interpreting *U.S. Const.*, amend. XIV); *State v. Anderson*, 127 *N.J.* 191, 200-01 (1992) (interpreting *N.J. Const.*, art. I, ¶ 1). *See also State v. Ragland*, 105 *N.J.* 189, 193-94 (1986).

My dissent rests on this syllogism: (a) the Federal and State Constitutions require that the jury decide each element of a crime beyond a reasonable doubt; (b) "purpose to intimidate . . . because of race, [or] color" is an element of the crime when that purpose raises the sentence for the crime; therefore (c) the Constitution requires that the jury decide whether the defendant acted with the purpose to intimidate because of the victim's race or color. *Cf. Anderson, supra,* 127 *N.J.* at 206. The State's power to define the elements of a crime cannot extend, as the majority holds, to defining away the actor's culpable purpose as an element of the crime – a crime for which this defendant received a sentence beyond the ordinary term for a second degree offense. *Cf. Mullaney v. Wilbur,* 421 *U.S.* 684, 698-99, 95 *S.Ct.* 1881, 1889-90, 44 *L. Ed.* 2d 508, 519-20 (1975).

Applied as a sentencing enhancement provision, this statute falls on the impermissible side of the constitutional line, and violates both the United States and the New Jersey Constitutions. The substance of section e can be saved only by recognizing the forbidden, biased purpose as an element of the underlying offense and requiring that a jury find proof of that purpose beyond a reasonable doubt. Defendant does not separately raise the right to indictment by a grand jury with respect to each element of the offense charged. *See N.J. Const.,* art. I, ¶ 8. *See also State v. D'Amato,* 218 *N.J. Super.* 595, 607 (App. Div. 1987). Nevertheless, that right follows once we recognize the purpose as an element of the more culpable offense. The Indictment returned by the grand jury against this defendant did not allege the prohibited purpose set forth in *N.J.S.A.* 2C:44-3e with respect to Count

18, the firearm charge for which defendant received an extended term.[6] Defendant's guilty plea did not provide a factual basis for the prohibited purpose, and he denied such purpose at the sentencing hearing. While defendant waived his right to jury trial on the underlying charge, he did not waive that right, or the right to proof beyond a reasonable doubt, with respect to the prohibited purpose.

By defining purpose as motive and not intent, the majority concludes that defendant's purpose is not an element of the crime. While motive need not be an element of an otherwise purposeful crime, it can be an element, for example as in the statute mandating a life sentence without parole for the murder of a member of law enforcement. *See N.J.S.A.* 2C:11-3b(2). Because section e elevates the culpability of the crime based on defendant's purpose, that purpose – whether it be described as motive or intent – must be deemed an element of the more serious crime, and not just a sentencing factor.

I agree that *State v. Mortimer,* 135 *N.J.* 517, 529 (1994), *cert. denied,* 513 *U.S.* 970, 115 *S.Ct.* 440, 130 *L. Ed.* 2d 351 (1994), resolves defendant's vagueness challenge to *N.J.S.A.* 2C:44-3e. *Mortimer,* however, does not address the constitutional infirmities of section e because the penalty enhancement provision of *N.J.S.A.* 2C:33-4d that was challenged in *Mortimer*[7] did not take the element of

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[6] The indictment included that purpose in Count 20, charging defendant with fourth degree harassment in violation of *N.J.S.A.* 2C:33-4d. Count 20 was dismissed in accordance with defendant's plea agreement.

[7] The Court held *N.J.S.A.* 2C:33-4d constitutional after narrowing the original language to avoid unconstitutional

purpose from the jury, nor allow a defendant's purpose to be found on less than proof beyond a reasonable doubt.[8] In *Wisconsin v. Mitchell*, 508 *U.S.* 476, 124 *L. Ed.* 2d 436, 113 *S.Ct.* 2194 (1993), the Supreme Court held that sentence enhancement for a defendant who selected the victim because of race did not violate defendant's First Amendment right of expression. However, as Judge Stern recognizes in footnote 1 of his concurring opinion, the challenged Wisconsin statute required the jury to determine whether defendant acted on account of the victim's race.

The majority concludes that the alleged purpose to intimidate because of race or color "defines motive, not intent," and therefore can be left to the judge to determine by a mere preponderance of the evidence. The Code itself suggests otherwise. "Purpose" in the criminal code is defined by *N.J.S.A.* 2C:2-2b(1):

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vagueness. That statute, defining harassing conduct as a petty disorderly persons offense, raises the offense to a fourth degree crime if the conduct is committed "with a purpose to intimidate . . . because of race, color, religion, gender, handicap, sexual orientation or ethnicity."

[8] Where a similar prohibited purpose to intimidate raises a simple assault from a disorderly persons offense to a fourth degree crime, the assault statute so provides. *N.J.S.A.* 2C:12-1(e). Because there is no extended term applicable to a disorderly persons or a petty disorderly persons conviction, *see* *N.J.S.A.* 2C:43-7a, the bias crime legislation incorporated the prohibited purpose into the provisions criminalizing harassment and assault. Indeed, since the petty disorderly offense is not indictable, the more serious charge of assault or harassment with the purpose to intimidate because of status triggers the right to grand jury indictment and jury trial.

> A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if he is aware of the existence of such circumstances or he believes or hopes that they exist. "With purpose," "designed," "with design" or equivalent terms have the same meaning.
>
> [emphasis added.]

The prohibited purpose described by section e – to intimidate because of race, etc. – fits precisely within the category of a result that is the actor's "conscious object . . . to cause. . . . " Furthermore, the victim's status within a protected category – in this case, race or color – is indeed an "attendant circumstance[ ]" that the defendant had to believe existed. There can hardly be a clearer example of acting with purpose than that spelled out by *N.J.S.A.* 2C:44-3e.

Moreover, the Code defines an "element of an offense" to include conduct, or attendant circumstances, or a result of conduct, if it

> (a) Is included in the description of the forbidden conduct in the definition of the offense;
>
> [or]
>
> (b) Establishes the required kind of culpability. . . .
>
> [*N.J.S.A.* 2C:1-14h]

An actor's purpose to intimidate because of color or race must be construed as part of the definition of the offense,

irrespective of where it appears in the Code. Moreover, 2C:44-3 shows us that acting with the proscribed purpose "establishes the required kind of culpability" – culpability that requires punishment as if for a crime one degree higher.

Except for *N.J.S.A.* 2C:44-3e, wherever the Code defines the seriousness of an offense (and thus the maximum sentence allowed) in terms of the actor's purpose, that purpose is treated as an element of the offense and can be found only by a jury, upon proof beyond a reasonable doubt. The net effect of section e, as recognized by the majority, is to elevate the substantive offense – in this case, unlawful possession of a firearm – from a second to a first degree crime. Where the grading of a Code offense depends upon the defendant's mental state, determining that purpose has always been the jury's province. The most obvious example is the homicide statute. It would be unthinkable to instruct the jury in a homicide trial to decide only whether the defendant's act caused the victim's death, leaving it to the sentencing judge to decide, based upon a mere preponderance of the evidence, whether the defendant intended death or serious injury likely to lead to death; or whether defendant acted recklessly; and if so, whether with a wanton disregard for human life. It would be equally unthinkable in a trial for lewdness under *N.J.S.A.* 2C:14-4 for a sentencing judge and not a jury to decide whether the defendant acted "for the purpose of arousing or gratifying . . . sexual desire . . . ," thereby raising the offense from a disorderly persons to a fourth degree crime. *See also N.J.S.A.* 2C:13-5 (criminal coercion); *N.J.S.A.* 2C:17-1 (arson).

Section e is distinguishable from every other sentence enhancing provision of the Code in that it extends the term of the sentence based on the defendant's mental state at the time of the offense. Except for the extended term provision at issue here, the Code neither mandates nor allows an extended term based upon the defendant's state of mind. The Code provides extended terms solely based upon objective facts. *See N.J.S.A.* 2C:44-3 a, b, c, d, f and g.

The analogy to mandatory parole ineligibility terms for crimes committed with a firearm (*N.J.S.A.* 2C:44-3d, the Graves Act) is not compelling. Graves Act sentencing is not conditioned upon the defendant's mental state, and mental state has historically and constitutionally been an element of the substantive offense.[9]

Section e is also distinguishable from every other Code provision where the status of the victim determines the degree of the crime, and therefore the maximum length of the sentence. The jury in every such case, and not the judge, is required to find beyond a reasonable doubt that the victim held the protected status. *See, e.g., N.J.S.A.* 2C:11-3b(2) (murder of a police officer); *N.J.S.A.* 2C:14-2 (sexual assault); *N.J.S.A.* 2C:12-1b (aggravated assault). Wherever a particular fact determines the degree of a Code offense, and therefore the maximum prison sentence, the jury determines that fact upon proof beyond

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[9] When mental state is an issue in a civil case that issue is normally sufficient to withstand a motion for summary judgment and require a jury trial. *See* Pressler, Current N.J. Court Rules, comment on *R.* 4:46-2, at 1317 (1997). *A fortiori*, mental state must be a jury question in a criminal trial.

a reasonable doubt. For example, theft can be anything from a second degree crime to a disorderly persons offense, depending upon the value the jury places on the stolen property. *See N.J.S.A.* 2C:20-26.

The issue before us in this case is not whether more severe punishment is appropriate for crimes committed to intimidate the victim because that person is a member of a protected group. The Legislature has said that it is. Nor is the issue whether the State could have proved to a jury beyond a reasonable doubt that this defendant acted with such purpose. Implicit or explicit speculation that a jury would have found the forbidden purpose does not justify leaving that issue to the judge or denying defendant the right to proof beyond a reasonable doubt. Where the State intends to seek a mandatory extended term sentence because the underlying crime is accompanied by the forbidden purpose set forth in *N.J.S.A.* 2C:44-3e, then unless the defendant expressly waives a jury, only a jury can find the defendant guilty and then only upon proof beyond a reasonable doubt.

Defendant's extended term sentence should be vacated and the matter remanded for resentencing to an ordinary second degree term as provided by *N.J.S.A.* 2C:43-6.

I would reverse.

I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ R. Emille Cox
Clerk

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1587-95t2

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
CHARLES APPRENDI, JR.,
Defendant-Appellant.

APPROVED FOR PUBLICATION
AUG 19 1997
APPELLATE DIVISION

STERN, J.A.D., concurring.

In *McMillan v. Pennsylvania*, 477 *U.S.* 79, 106 *S. Ct.* 2411, 91 *L. Ed.* 2d 67 (1986), the Supreme Court rejected Fourteenth Amendment due process clause and Sixth Amendment arguments addressed to Pennsylvania's statute requiring a five-year minimum sentence for certain crimes committed with a firearm. The arguments included assertions that the statute was unconstitutional because it permitted proof of elements of an offense by a mere preponderance of the evidence and without the need for jury trial.

The Pennsylvania statute there involved "does not authorize a sentence in excess of that otherwise allowed for th[e] offense"; it "neither provides for an increase in the maximum sentence . . . nor authorizes a separate sentence. . . . " *Id.* at 82-83, 106 *S. Ct.* at 2414, 91 *L. Ed.* 2d at 73-74. Rather, the Pennsylvania statute "merely requires a minimum sentence of five years, which may be

more or less than the minimum sentence that might otherwise have been [lawfully] imposed" within the range of sentence for the crime. *Id. at 83-88, 106 S. Ct.* at 2415-17, 91 *L. Ed.* 2d at 74-75.

The statute [with] which we deal, *N.J.S.A.* 2C:44-3e, requires an extended term. In discussing the burden of proof issue, the *McMillan* Court referred to prior rejections of similar due process arguments addressed to "an enhanced sentence," *id.* at 93, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 80, and Judge Humphreys' comprehensive opinion traces the post-*McMillan* treatment of similar issues by the federal Courts of Appeal.

The required culpability or state of mind traditionally is an element of the offense which the State must prove by proof beyond a reasonable doubt. *See, e.g., In re Winship*, 397 *U.S.* 358, 90 *S. Ct.* 1068, 25 *L. Ed.* 2d 368 (1970); *State v. Medina*, 147 *N.J.* 43, 49-50 (1996), *cert. denied*, ___ *U.S.* ___, 117 *S. Ct.* 1476, 137 *L. Ed.* 2d 688 (1997); *see also N.J.S.A.* 2C:2-2. And where a sentence of over six months may be imposed, there is a traditional right of trial by jury. *See, e.g., Baldwin v. New York*, 399 *U.S.* 66, 90 *S. Ct.* 1886, 26 *L. Ed.* 2d 437 (1970); *Duncan v. Louisiana*, 391 *U.S.* 145, 88 *S. Ct.* 1444, 20 *L. Ed.* 2d 491 (1968); *In re Yengo*, 84 *N.J.* 111, 120-21 (1980), *cert. denied*, 449 *U.S.* 1124, 101 *S. Ct.* 941, 67 *L. Ed.* 2d 110 (1981). Yet Judge Humphreys' thorough and exhaustive opinion demonstrates that there is a difference, for sentencing purposes, between culpability or state of mind, on the one hand, and motive on the other.[1] *See also N.J.S.A.* 2C:1-4, 1-5, 1-13a, 1-14h, i.

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[1] *Wisconsin v. Mitchell*, 508 *U.S.* 476, 480, 113 *S. Ct.* 2194, 2197, 124 *L. Ed.* 2d 436, 442 (1993), upheld a statute providing for an enhanced sentence because the crime was "committed . . . because of the race, religion [or] color" of the victim. However, the statute directed that the fact-finder return a "special verdict" on the question and only First Amendment issues were involved. *Id.* at 481 n.1, 113 *S. Ct.* at 2197 n.1, 124 *L. Ed.* 2d at 442 n. 1.

I concur in Judge Humphreys' opinion in this case because the sentence enhancer is in a general sentencing provision of the Code adopted after the Code's provisions establishing the crime, *see McMillan, supra*, 477 *U.S.* at 86, 90, 106 *S. Ct.* at 2416, 2418, 91 *L. Ed.* 2d at 79, and feel bound by our Graves Act cases which mandate ineligibility terms on ordinary and required extended term sentences where a judge finds by a preponderance of the evidence that defendant used or possessed a firearm notwithstanding the fact that the offense for which he or she was convicted did not necessarily involve use or possession of a firearm as an element thereof. *See N.J.S.A.* 2C:43-6c, d; 2C:43-7c; *State v. Stewart*, 96 *N.J.* 596, 605-06 (1984); *see also, e.g., State v. Haliski*, 140 *N.J.* 1 (1995); *State v. White*, 98 *N.J.* 122, 131 (1984). Defendant does not contend that the objective finding required under the Graves Act or the statute in *McMillan* is constitutionally significant when compared with the relevant fact finding necessary for an enhanced sentence for a bias crime. Nor does defendant point to any State constitutional policy or value which justifies or requires different treatment of the issue under state law.

I emphasize that my vote in this case does not signal a view that legislation which alters traditional values with respect to fact-finding in criminal cases should be treated liberally. I also emphasize that we decide only the

precise constitutional issues raised by the defendant in this case.

I hereby certify that the
foregoing is a true copy of the
original on file in my office.

/s/ R. Emille Cox
Clerk

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1587-95T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CHARLES APPRENDI, JR.,

Defendant-Appellant.

APPROVED FOR PUBLICATION

AUG 19 1997

APPELLATE DIVISION

(Filed Aug. 19, 1999)

Argued February 4, 1997 – Decided AUG 19 1997

Before Judges Stern, Humphreys and Wecker.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County.

Joseph D. O'Neill argued the cause for appellant (Joseph D. O'Neill, attorney; Mr. O'Neill and Charles I. Coant, on the brief).

Lisa Sarnoff Gochman argued the cause for respondent (Peter Verniero, attorney General of New Jersey, attorney; Ms. Gochman, of counsel and on the brief).

The opinion of the court was delivered by

HUMPHREYS, J.A.D.

The defendant appeals his extended term sentence which was imposed pursuant to *N.J.S.A.* 2C:44-3(e) (the "Hate Crime Statute"). The defendant asserts that the statute is unconstitutional because: (1) the statute is too vague; (2) the statute violates his constitutional right to

due process by using a preponderance of the evidence standard.

We have thoroughly reviewed the record and considered the arguments presented. We conclude that the statute is constitutional and affirm.

I

The defendant fired a rifle on two occasions in 1994 at the home of a neighbor. On the first occasion, a bullet entered the third floor bedroom of one of the neighbor's three children. On the second occasion, defendant fired several times and as a result the neighbor's front door and windows were "bullet-riddled." Fortunately, no one was injured. The defendant is white; the neighbor is an African-American. The police later searched the defendant's home and found an "arsenal of weapons," including an anti-personnel bomb.

The defendant was charged in an indictment with various crimes, including first-degree attempted murder. He pled guilty on July 24, 1995 to counts three and eighteen charging him with the second degree crime of possession of a firearm for an unlawful purpose in violation of *N.J.S.A.* 2C:39-4(a) and to count twenty-two charging him with the third degree crime of unlawful possession of a prohibited weapon, the anti-personnel bomb, in violation of *N.J.S.A.* 2C:39-3(a). The defendant conditioned his plea upon the right to appeal his sentence. *See R.* 3:19-3(f).

The State moved to have the defendant sentenced to an extended term pursuant to *N.J.S.A.* 2C:44-3(e). That statute provides:

> The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .
>
> e. The defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.
>
> [*Ibid. but see* L. 1995, c. 211, 93, eff. Aug. 14, 1995 (amending the text of this statute).]

The extended sentence for the defendant's second degree crimes is between ten and twenty years which is the ordinary range for a first degree crime. For his third degree crime, the extended sentence would be five to ten years which is the ordinary range for a second degree crime. *See N.J.S.A.* 2C:43-7(a)(3), (4); *N.J.S.A.* 2C:43-6(a)(2), (3). In effect, hate crimes are sentenced one degree higher.

A police officer testified at the hearing on the State's motion that the defendant had told the police that he shot at the house because he knew that blacks were living there and he wanted to give them "a message that they were in his neighborhood."

The defendant, a pharmacist, testified at the hearing. He said that he shot at the front door because the "glass and the purple door" caught his eye and that at the time

of the incident, he was under the influence of alcohol and drugs. He denied that he shot at the house because he wanted to keep blacks away from the area. He also denied that he was a racist or a member of any racist group. He said that he had black friends and had no bias against African-Americans. He testified that he lied to the police about his reasons for shooting, because the police officer threatened him and the defendant wanted to get the interrogation over with.

A psychologist testifying for the defendant at the hearing said that the defendant suffered from an obsessive-compulsive disorder, a cyclothymic disorder (excessive mood swings), drug dependence, alcohol abuse, the impulse disorder of kleptomania, and premature ejaculation. The psychologist concluded that a person of defendant's personality type would say or do almost anything, including lie, to get out of a police interrogation.

The judge found that the testimony of the police officer was "credible, believable." The judge said that the questioning of the defendant by the police "was not overbearing. It was not onerous or is not in any sense dictatorial." The judge said he was "satisfied that the crime was motivated by racial bias" and that the defendant's explanation for the shooting was bizarre. The judge concluded that the defendant had changed his story in order to avoid punishment for a bias crime. The judge found that "the standard of proof required by the statute [preponderance of the evidence] has been met. The defendant is subject to enhanced penalties."

The defendant was sentenced on count eighteen to an extended term of twelve years with a parole ineligibility

of four years, the mandatory minimum parole ineligibility under the Graves Act. *See N.J.S.A.* 2C:43-6(c). He was sentenced on count three to a concurrent term of seven years imprisonment with a three year parole bar and on count twenty-two to a concurrent term of three years imprisonment. He was ordered to pay $1,980 restitution to the victim. On each of the three counts, a $100 Violent Crimes Compensation Board penalty and a $75 Safe Street Act penalty were imposed. The remaining counts were dismissed.

II

The defendant contends that the statute is too vague. *See State v. Afanador,* 134 *N.J.* 162, 170 (1993) (a criminal statute is unconstitutionally vague "if persons of common intelligence must necessarily guess at its meaning and differ as to its application"); *State v. Cameron,* 100 *N.J.* 586, 593 (1985) (a statute is facially invalid where it is "impermissibly vague in all its application, that is, there is no conduct that it proscribes with sufficient certainty").

The defendant's contention is refuted by the decision of the *New Jersey Supreme Court in State v. Mortimer,* 135 *N.J.* 517, 529, *cert. denied,* 513 *U.S.* 970, 115 *S. Ct.* 440, 130 *L. Ed.* 2d 351 (1994). In that case, the Court considered the constitutionality of a section of the Hate Crime Statute, *N.J.S.A.* 2C:33-4(d), which provided that "harassment," a petty disorderly persons offense, would be raised to a fourth degree offense if the defendant "acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or

ethnicity." The defendant in *Mortimer, supra,* challenged the statute on a number of constitutional grounds including vagueness. The Supreme Court said that if the statute were "construed narrowly and applied to a proper predicate offense, subsection d withstands a 'vagueness' challenge." 135 *N.J.* at 531. The Court cured the vagueness problem by excising the words "at least in part, with ill will, hatred or bias toward." *Id.* at 534.

The section of the Hate Crime Statute at issue in the present case, *N.J.S.A.* 2C:44-3(e), has the same language as that construed in *Mortimer*. As was done in *Mortimer*, we will excise the words "at least in part, with ill will, hatred or bias toward" and thereby overcome the vagueness challenge. We note that the Legislature has already made this change to the text of the statute (the statute was amended by L.1995, c. 211, § 3, eff. Aug. 14, 1995).

III

The Hate Crime Statute provides for an extended term based upon a finding of bias by a preponderance of the evidence. *N.J.S.A.* 2C:44-3(e). The Due Process clause of the United States Constitution "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 *U.S.* 358, 364, 90 *S. Ct.* 1068, 1073, 25 *L. Ed.* 2d 368, 375 (1970); *accord State v. Anderson*, 127 *N.J.* 191, 200-01 (1992). The defendant argues that using the preponderance of evidence standard to mandate an extended term sentence violates the constitutional requirement that the State

must prove the elements of a crime by the reasonable doubt standard.

The flaw in the defendant's argument is that the Legislature has not made racial bias an element of the crime. The Hate Crime Statute acts as a sentencing factor. The language in the statute is not included in the definition of any crime in the New Jersey Code of Criminal Justice. Instead, the statute is included in a section of the code entitled "authority of court in sentencing." As to sentencing factors which are not elements of a crime, the State's burden of proof is not subject to the reasonable doubt standard. *See McMillan v. Pennsylvania*, 477 *U.S.* 79, 91, 106 *S. Ct.* 2411, 2419, 91 *L. Ed.* 2d 67, 79 (1986).

A State has the power to define the elements of a crime. The State's definition of the elements of the crime is usually "dispositive." *Id.* at 85, 106 *S. Ct.* at 2415, 91 *L. Ed.* 2d at 75. The State's power to define the elements of a crime has constitutional limits. *Id.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79; *Paterson v. New York*, 432 *U.S.* 197, 210, 97 *S. Ct.* 2319, 2327, 53 *L. Ed.* 2d 281, 292 (1977) (there are constitutional limits to the State's power to redefine the elements of a crime so as to eliminate the reasonable doubt standard); *Mullaney v. Wilbur*, 421 *U.S.* 684, 699, 95 *S. Ct.* 1881, 1889-90, 44 *L. Ed.* 2d 508, 519-20 (1975) (the State may not require a defendant charged with murder to bear the burden of proving the elements of manslaughter in order to reduce the crime to manslaughter; the State may not undermine due process by redefining elements that constitute different crimes and characterizing them as factors bearing solely on punishment).

In *McMillan, supra,* the State statute provided for a mandatory minimum sentence of five years imprisonment if the sentencing judge found by a preponderance of the evidence that the defendant "visibly possessed" a firearm during the commission of certain enumerated felonies. The Supreme Court found the statute to be constitutional. The Court said that the constitutionality of a statute redefining a crime would "depend on differences of degree" and that the statute in *McMillan* fell on the "permissible side of the constitutional line." 477 *U.S.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79.

The Court pointed out in *McMillan* that the statute did not create a presumption that the person was guilty of a crime and did not restructure existing crimes to evade the requirements of the Due Process clause. *Id.* at 87, 106 *S. Ct.* at 2416-17, 91 *L. Ed.* 2d at 77. The Court said: "[t]he statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77. Instead, the State has taken a traditional sentencing factor, possession of a firearm, and "dictated the precise weight to be given that factor." *Id.* at 89-90, 106 *S. Ct.* at 2418, 91 *L. Ed.* 2d at 79. The Court also said that the defendants' claim that visible possession is "really" an element of the crime, "would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment. . . . " *Id.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77-78.

The New Jersey Hate Crime Statute does not create a presumption of guilt nor does it restructure any crimes. The statute is not "tailored to permit the [racial or other

bias] finding to be a tail which wags the dog of the substantive offense." *See id.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 77; *State v. Federico,* 198 *N.J.* Super. 120, 128-29 (App. Div. 1984) (the elements distinguishing the degrees of the crime of kidnapping must be determined by the jury and not the judge to avoid undermining a defendant's constitutional due process rights), *aff'd,* 103 *N.J.* 169 (1986) (affirming on statutory construction grounds; the Court expressly did not determine whether the result is "compelled by either the United States or New Jersey Constitutions"); *see also State v. Anderson,* 127 *N.J.* 191 (1992) (provision in the Code of Criminal Justice that materiality in a prosecution for perjury is a matter of law for the judge to determine is a violation of the New Jersey Constitution because materiality is an element of the crime).

Further, in New Jersey "motive traditionally has been an important factor for judges to consider at sentencing." *Mortimer, supra,* 135 *N.J.* at 528. Here, as in *McMillan,* the State has taken a sentencing factor, the motive for the crime, and prescribed the weight to be given it. *See* 477 *U.S.* at 89-90, 106 *S. Ct.* at 2418, 91 *L. Ed.* 2d at 79.

Numerous cases have held that sentencing factors do not have to be established beyond a reasonable doubt. *See State v. Biegenwald,* 106 *N.J.* 13, 59 (1987) (ordinarily, the State's contentions at a sentencing proceeding need not be proven beyond a reasonable doubt, even those that are statutorily prescribed); *State v. Smith,* 279 *N.J.* Super. 131, 139 (App. Div. 1995) (the State need not prove beyond a reasonable doubt grading provisions which do not constitute elements of the offense); *see also* Graves Act, *N.J.S.A.* 2C:43-6(c) (upon a judge's finding by a preponderance of

the evidence that a defendant used or possessed a gun while committing certain crimes, a sentence of three years without parole must be imposed); *State v. Des Marets*, 92 *N.J.* 62 (1983) (the Graves Act does not unconstitutionally infringe upon the judicial power to suspend sentences); *cf. Wisconsin v. Mitchell*, 508 *U.S.* 476, 490, 113 *S. Ct.* 2194, 2202, 124 *L. Ed.* 2d 436, 448 (1993) (a penalty enhancement statute for race-based selection of a victim was not unconstitutional, overbroad or violative of free speech); *State v. Cotella*, 298 *N.J.* Super. 668, 675-76, 690 A.2d 156 (App. Div. 1997) (upholding an extended sentence imposed under the Hate Crime Statute).

The New Jersey Hate Crime Statute does expose the defendant to "greater and additional punishment" and therefore the defendant's claim has "superficial appeal." *See McMillan, supra*, 477 *U.S.* at 88, 106 *S. Ct.* at 2417, 91 *L. Ed.* 2d at 78. However, this one factor standing alone does not place the statute on the "impermissible side of the constitutional line." *See id.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79. Court decisions have consistently upheld the constitutionality of statutes containing sentencing factors which impose a greater or additional punishment. In *United States v. Rumney*, 867 *F.*2d 714, 717 (1st Cir.), *cert. denied*, 491 *U.S.* 908, 109 *S. Ct.* 3194, 105 *L. Ed.* 2d 702 (1989), the court held that the heightened penalty provided by the Armed Career Criminal Act ("ACCA") 18 *U.S.C.* § 924(e)(1), for persons who possess a firearm "after having been thrice convicted of burglary/robbery is a sentence enhancer [not] a substantive crime." Virtually all of the other federal courts of appeal have reached the same conclusion. *E.g., United States v. McGatha*, 891 *F.*2d 1520, 1524 nn. 27, 29 (11th Cir.) (noting

that all the federal circuit courts of appeal except the second and fifth circuit have held that the ACCA does not create a new offense but is merely a sentence enhancement provision), *cert. denied*, 495 *U.S.* 938, 110 *S. Ct.* 2188, 109 *L. Ed.* 2d 516 (1990); *but see United States v. Davis*, 801 *F.*2d 754 (5th Cir. 1986); *see also United States v. Palacios-Casquete*, 55 *F.*3d 557 (11th Cir. 1995) (agreeing with four and disagreeing with one federal circuit courts of appeal by holding that a criminal statute regarding deported aliens remaining unlawfully in the United States is a sentence enhancing statute as opposed to a statute defining a separate crime).

The merits of hate crime statutes have been widely recognized. Most of the states have enacted hate crime statutes which provide for enhanced sentences for bias crimes. *See* Craig P. Gaumer, *Punishment for Prejudice: A Commentary on the Constitutionality and Utility of State Statutory Responses to the Problem of Hate Crimes*, 39 *S. D. L. Rev.* 1, 9 & n. 39 (1994) (noting that as of 1994, twenty-nine states had enacted Hate Crime Statutes which were "essentially" sentence enhancement statutes).

In *Mortimer, supra*, the Supreme Court stated:

> [t]he Legislature can surely treat bias-motivated offenses with an enhanced level of severity, because bias crimes, by nature, have distinct harmful effects. As the Supreme Court has noted, "bias-motivated crimes are more likely [than other crimes] to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Therefore, a regulation providing harsher penalties for bias-motivated crimes is appropriate as a

> means of addressing the greater harm those crimes cause.
>
> Thus, we hold that subsection d does not violate the First Amendment. The statute neither regulates protected expression *nor impermissibly punishes motive.*

[135 *N.J.* at 529 (citation omitted) (emphasis added).]

In providing for enhanced sentencing in crimes motivated by racial bias, the Legislature has not trespassed on the fundamental element of criminal intent. The requisite criminal intent for this defendant's crimes has been established by his plea of guilty, namely, (1) having a firearm in his possession "with a purpose" to use it unlawfully against the person or property of another, *N.J.S.A.* 2C:39-4(a); and (2) "knowingly" having in his possession a destructive device. *N.J.S.A.* 2C:39-3. Motive is quite different from intent. " . . . *[M]otive* is the inducement for doing an act; the *intent* is the resolve to commit an act." Stated differently, *motive* relates to the end; *intent* relates to the means. Bryan A. Garner *A Dictionary of Modern Legal Usage* 458 (2d Ed. 1995).

In *Morss v. Forbes*, 24 *N.J.* 341, 359 (1957), the Court said that intent should not be "confused" with motive and "proof of motive is never essential to a conviction but may be evidential." In *Snakenberg v. Hartford Casualty Ins. Co.*, 383 *S.E.*2d 2, 7 & n. 7 (S.C. Ct. App. 1989), the court said: "purpose relates to the result desired by the actor; motive is his subjective reason for desiring the result." *See also* 21 *Am. Jur.* 2d *Criminal Law* § 173 (1981) ("In criminal law motive may be defined as that which leads or tempts the mind to indulge in a criminal act, or as the moving power which impels to action for a definite

result. Motive is distinguishable from intent, which is the purpose to use a particular means to effect a certain result. Motive is not an essential element of any crime, unless made so by statute.")

The parties have not cited and our legal research has not uncovered any case in which the motive for the crime when used solely as a sentencing enhancer or factor is transformed into an element of the crime which then must be established beyond a reasonable doubt. The modern trend in the law is in the opposite direction. Sentencing judges are being given more discretion to engage in factfinding regarding the circumstances of the crime. As stated in a law review article:

> Under real-offense sentencing systems, [sentencing] judges are given spacious authority to determine an offender's "real" crimes. . . .
>
> The United States Constitution, as currently interpreted, imposes virtually no restrictions on the practices of real-offense sentencing. Any constitutional constraints that might be imagined by lawyers or academics would require the making of "new Law," and the present Supreme Court has given no signals of movement in that direction. Indeed, the few major rulings handed down by the Court Have uniformly given the states wide latitude in structuring their laws concerning factfinding at sentencing.

[Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 *Stan. L. Rev.* 523, 542 (1993); *see also* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 *U.C.L.A. L. Rev.* 1179 (1993) (criticizing real offense sentencing and *McMillan*); Susan N. Werman, *The Tail that Wagged the Dog:*

Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process, 66 *S. Cal. L. Rev.* 289 (1992) (same).]

We recognize that in a given case, a draconian statutory sentencing mandate based upon a finding of motive reached only by a preponderance of the evidence could infringe on a defendant's due process rights. However, we are also mindful that an act of the Legislature should not be lightly cast aside. Legislatures "are guardians of the liberty and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Railway Co. v. May*, 194 *U.S.* 267, 270, 24 *S. Ct.* 638-39, 48 *L.Ed.* 971, 973 (1904) (Holmes, J.). Further, "every possible presumption favors the validity of an act of the Legislature." *New Jersey Sports & Exposition Auth. v. McCrane*, 61 *N.J.* 1, 8 (1972). We are satisfied that this statute falls on the permissible side of the constitutional line. *See McMillan*, *supra*, 477 *U.S.* at 91, 106 *S. Ct.* at 2419, 91 *L. Ed.* 2d at 79.

In sum, if a person is convicted of a crime by a plea of guilty or by proof beyond a reasonable doubt, we find no constitutional impediment to a statutory requirement for an extended term upon the sentencing judge being satisfied by a preponderance of the evidence that the crime was committed because of racial hatred.

Affirmed.

I hereby certify that the
foregoing is a true copy
of the original on file in
my office.

/s/ R. Emille Cox
Clerk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CUMBERLAND
COUNTY
IND NO. 95-01-46
A.D. #1587-95-T4

STATE OF NEW JERSEY, Plaintiff, vs. CHARLES APPRENDI, JUNIOR Defendant.	TRANSCRIPT OF MOTION AND SENTENCING

Place: Cumberland County
Courthouse
Broad and Fayette Streets
Bridgeton, New Jersey

Date: September 29, 1995

BEFORE:

THE RUSHTON H. RIDGWAY, J.S.C.

TRANSCRIPT ORDERED BY

JOSEPH D. O'NEILL, ESQ.

APPEARANCES:

ROBERT J. LUTHER, First Assistant Prosecutor
Attorney on behalf of the State of New Jersey

JOSEPH D. O'NEILL, Esq. Attorney on behalf of the Defendant

THE TYPE-RIGHT-ER
Carol H. Vendzules
Certified Agency Director/
Transcriber, AOC #268
State of New Jersey
(609) 881-2422

Sound-Recorded Proceeding
Recording Operator, Joan Tuthill

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Colloquy

[p. 3] THE COURT: All right, Mr. O'Neill.

MR. LUTHER: Judge, excuse me. If I can suggest – there's a motion and there's sentencing. And the State has a witness it wants to call for purposes of the motion. Perhaps we can proceed by calling the witness first and then proceeding forward?

MR. O'NEILL: Well, I was unaware of this, Judge. May we know the identity of the witness so I can know whether I should object or not?

MR. LUTHER: Judge, at the time of September 5 when Mr. O'Neill called witnesses, I told the Court then that I was going to call Mr. Fowlkes as a witness for the motion.

THE COURT: I think you did. He wasn't available at the time, I think, wasn't he?

MR. LUTHER: Well, no, the original understanding of the State was that the motion was going to be heard on the day of sentencing. Mr. O'Neill proceeded with witnesses on the motion on September 5. I told the Court at that date that I was going to call Mr. Fowlkes for purposes of the motion.

THE COURT: Very well.

MR. LUTHER: Thank you, Judge.

I call Michael Fowlkes at this time.

THE COURT: You come up here, Mr. Fowlkes. Come around.

Is the Bible over there?

M. Fowlkes – Direct

[p. 4] THE CLERK: Yes, it is, Your Honor.

THE COURT: All right. You want to place your left hand on the Bible and raise your right?

MICHAEL DAVID FOWLKES, WITNESS, SWORN

THE COURT: And your full name is?

THE WITNESS: Michael David Fowlkes.

THE COURT: Very well. Have a seat.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Good morning, sir. Could you tell the Judge your name, please?

A. My name is Michael David Fowlkes.

Q. And where do you live, sir?

A. I live at 5211 East Chestnut Avenue.

Q. And what city is that in?

A. Vineland, New Jersey.

Q. And how close is that to Atlantic County?

A. That is approximately 25 to 35 yards.

Q. From Atlantic County?

A. From Atlantic County.

Q. So you're just at the very edge of Cumberland County then?

A. Correct.

Q. And is it about two miles east of Lincoln Avenue in the City of Vineland?

A. Yes, it is.

[p. 5] Q. Okay. Sir, when did you move into 5211 East Chestnut Avenue?

A. July 28th, 1994.

Q. Was that the settlement date?

A. Yes, it was.

Q. Were you fully moved in on that date or no?

A. Correct. Yes, we were fully moved in.

Q. Okay. Let me see. Did you – prior to December 22nd of 1994, did you know an individual by the name of Charles Apprendi?

A. No, I did not.

Q. When is the first time that you even saw Mr. Charles Apprendi?

A. The first time that I saw Charles Apprendi was the morning of December 23rd. I'd say it was 4:32 a.m. And me and my wife was riding – went down – down the block heading west. And we seen the police officers putting Charles into the car.

Q. Okay. And do you see that person in court today?

A. Yes, I do.

Q. And could you indicate where he is?

A. That's him, right there.

Q. Okay.

THE COURT: All right. Let the record reflect that he's pointed to Mr. Apprendi.

DIRECT EXAMINATION BY MR. LUTHER:

[p. 6] Q. Sir, you said it was December 23rd of 1994. Was it the morning right after your house was shot at?

A. Correct.

Q. Okay. Was – do you recall if that was December 22nd, 1994?

A. I'm not positively sure on the dates. It was either the 22nd or the 23rd. And the reason –

Q. Okay.

A. – that it was confusing – because of the a.m. and p.m. switch.

Q. Right; okay. Sir, how long had you been saving up to buy the house on 5211 East Chestnut?

MR. O'NEILL: Objection; irrelevant.

THE COURT: Prosecutor, is it relevant?

MR. LUTHER: Well, I just wanted to know how long he had been –

THE COURT: I'm going to sustain the objection.

MR. LUTHER: All right.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, between August of '94 and December of '94, were yourself and your family frequently outside your house?

A. Correct.

Q. And could you just briefly tell me about that?

A. Well, me and my son like to do yard work. We would – we would – we were putting shrubs in, cleaning up brush, setting [p. 7] up firewood, setting up our dog pens for our dogs, different, et cetera, things that you – you do around your yard.

Q. Okay. Sir, although it's obvious, could you tell – for the purposes of the record, what color are you?

A. I am a black American.

Q. Okay. And are you married?

A. Yes, I am.

Q. And what's your wife's name?

A. My wife's name is Mattie.

Q. And what race is she?

A. She is a black American.

Q. Okay. Do you have any children?

A. Yes, I do.

Q. How many?

A. I have three children.

Q. And what are their names and ages?

A. My oldest son is Philip Fowlkes. He is 16. My daughter's name is Dawn. She is 13. And my younger son's name is Michael, Junior. And he is 9.

Q. Okay. Were they living with you at 5211 East Chestnut from August, '94 through December of '94?

A. Yes, they were.

Q. Okay. Sir, east of Lincoln Avenue on Chestnut in the City of Vineland, to your knowledge are you the only black family that lives in that area?

[p. 8] A. Correct.

Q. Are you familiar with another family that has a wagon wheel in the front of the house?

A. Yes, I am.

Q. And what race are they?

A. They are white.

Q. All right. Sir, are you familiar with the location of Mr. Apprendi's home?

A. Yes, I am.

Q. And approximately how far is it from your house?

A. I would take a guess it's between five to eight-tenths of a mile.

Q. And is that east or west of your home?

A. That is west of my home.

Q. Okay. And do you also know where the Greek Island Restaurant is in the City of Vineland?

A. Yes, I do.

Q. And is that east or west of your home?

A. That is west of our home.

Q. Do you know what road that's on in Delsea (sic) – in Vineland?

A. That is on Delsea Drive.

Q. Okay.

A. Delsea and Sherman, to be – be in the approximate area.

Q. All right. Sir, how far back does your house sit [p. 9] from the roadway?

A. It is approximately a-hundred-and-eighty-foot driveway.

Q. Okay. And that's a-hundred-and-eighty-feet back from East Chestnut Avenue?

A. Correct.

Q. Sir, directing your attention to late September of 1994, could you tell the Court just briefly about what, if anything, unusual happened on that date?

A. Could you repeat the question, please?

Q. Sure. Late September of '94, sir, if you could just briefly tell the Court anything unusual that happened at your home.

MR. O'NEILL: Judge, I object. It's not really relevant here because we're here for sentencing. The defendant has pleaded guilty to that crime. There's no need to prove it again.

THE COURT: I think it's connected with the motion for an extended term. And I'll permit it.

The objection's overruled.

MR. LUTHER: Thank you.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, if you could just tell the Court briefly what, if anything, unusual happened in late September at your residence.

A. On late – in September, late September, our home was shot [p. 10] at. On a Saturday morning was when we first noticed that there was a bullet hole in – in my top kid's room –

Q. Okay.

A. – through – through the glass, pane glass.

Q. And how many stories is your house?

A. Three stories.

Q. All right. And what story was the bullet hole on?

A. The third.

Q. All right. Whose room was the window in?

A. That was my younger son, Michael, the 9-year-old.

Q. All right. Was he in his bedroom that evening?

A. Correct.

MR. O'NEILL: I'm going to object, Judge. I think this is prejudicial. It's really meant to inflame the Court. And I think it's improper. The fact that the bullet was discharged, the fact that the defendant pleaded guilty to it, has nothing whatever to do with who was in the room at what time or what have you.

THE COURT: I'm going to overrule the objection.

Go ahead, Mr. Luther.

MR. LUTHER: Thank you, Judge.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, could you tell us who was in the room that evening?

A. My younger son, Michael, my 9-year-old.

[p. 11] Q. And where was his bed located at that time?

THE COURT: Are you talking about one son or two?

THE WITNESS: One son, sir.

THE COURT: All right.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Okay. And where was his bed located?

A. His bed is located in the middle, three-quarters towards the window. His bed is, I'd say, taking a rough guess, maybe 2 feet from the window.

Q. Okay. Sir, were there also two other incidents in November of this year where your house was shot at?

A. Yes, there were.

Q. And just one bullet in both instances?

A. Correct.

Q. And could you just briefly tell the Court where those bullets were located?

A. The one bullet was located on the east side of the – the house. And – and it was lodged in the siding. The second bullet was located in the middle of the house. And – and – and it was lodged in the stucco.

Q. Okay. Did either of those bullets enter the home?

A. No.

Q. Was anything found in the family room or no?

A. Yes, there was. There was a bullet. In fact, I have to correct that. Yes, the second bullet was lodged in the home.

[p. 12] Q. Okay.

A. And that bullet fragment was found in our family room.

Q. All right. How did that bullet enter the home?

A. It entered through the – the molding on the – on the window frame.

Q. And which room is that?

A. That is the family room.

Q. And what –

A. That is the room below my younger son's room.

Q. And what floor is that on?

A. That is the second floor.

Q. Okay. Is the second floor the ground floor of your home?

A. Correct.

Q. All right. And the first floor – I guess you would call it the lower level?

A. Correct.

Q. All right. Focusing on December 22nd of last year, how many bullets were fired at your home?

A. Eight bullets.

Q. And could you tell the Court about that?

A. Well, it was 1:55 a.m. in the morning. Me and my wife was woken (sic) up by bullet holes, glass shattered. Everything everywhere in our foyer. At that particular time I had ran outside and I ran to the edge of the road. And that – at that [p. 13] time that's when I seen a – a – a gray Chevy truck with a cab make a left turn heading west down Chestnut.

Q. Okay.

A. And at that time my wife had by then called the police.

Q. All right. Could you describe the damage to your home?

A. It – that's going to be a hard one, Robert. And the reason is there was so much damage. The two French doors were bullet-riddled. I had – my stairway that goes up the steps to my – to my upstairs, that was bullet-riddled. Whew. The – the downstairs foyer closet. The frame of the door. There was bullet holes through that. I have a – me and my wife have a moon-shaped window in the front of our foyer. That was bullet-riddled.

Q. Could you describe those doors to the Court, your front doors?

A. They're – they're two French doors. The – three-quarters of the door is glass. I'd say there's 6 inches of frame space there.

Q. And what color is the frame on those French doors?

A. Burgundy.

Q. All right.

THE COURT: And there's 6 inches around the glass part?

THE WITNESS: Yes, the – it's the average –

[p. 14] THE COURT: The frame.

THE WITNESS: Yes, the frame.

THE COURT: The glass has to be held by something.

THE WITNESS: Yes.

THE COURT: And that's – the frame you're talking about is 6 inches. The rest of it's glass.

THE WITNESS: Correct.

THE COURT: And what's the color of the glass? What type of glass is it?

THE WITNESS: Clear.

THE COURT: Clear glass?

THE WITNESS: Yes.

THE COURT: But the frame is burgundy?

THE WITNESS: Correct.

THE COURT: All right.

THE WITNESS: And, Your Honor, I'd like to add to that. On the windows – it was two days before Christmas. And we had put Christmas decorations up. And my wife had put two black Santa Clauses in the middle of the – the glass windows. That was also attached to the doors – to the doors theirself (sic).

DIRECT EXAMINATION BY MR. LUTHER:

Q. Were any of those black Santa Clauses shot by the bullets?

A. Yes, they were.

[p. 15] Q. Okay. The damage to the inside of the house, were there any bullet holes in any walls?

A. Yes, there were.

Q. And where does your daughter, Dawn, sleep?

A. She sleeps on the east side of the house in the back room.

Q. And were there any bullet holes in the opposite side of her bedroom wall?

A. Yes, there were.

Q. Did the bullet actually go into her bedroom or no?

A. No, the bullet did not. I believe that it lodged in the wall.

MR. O'NEILL: Your Honor, I'm going to object to this questioning if it's intended to proceed, because there were four incidents of shooting. There are convictions as to two. Unless the witness can differentiate among them, it's improper, it's prejudicial, to hear testimony as to other than the two for which there has been a conviction.

MR. LUTHER: Judge, I have no further questions.

THE COURT: All right.

Cross-examine.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Now, Mr. Fowlkes, as to the house with the wagon wheel in front of it, you testified that there are white people living in there; right?

A. Correct.

[p. 16] Q. You don't know, do you, sir, whether there were black people living in there before the white people moved in?

A. No, I do not.

Q. All right. Now, before you moved into that house in August of the previous year, you don't know what black people, if any, lived in the area; do you, sir?

A. Yes, I – I'm pretty familiar, sir, because East Chestnut was the route that I took to my job every day.

Q. Well, the fact that you took that route every day didn't permit you to determine whether the people who

lived in each of those residences were black or white; isn't that so?

A. No, sir, I find that incorrect, because I am a very observant person. And we – and me and my wife's plans were to move to East Vineland. And what we would do, we would ride around and look at property and land and other people's homes and – to find out how our surroundings would be.

Q. If I asked you to identify each of the people by family name who lived on that street during the summer of 1994, could you do it or could you not?

A. I could not.

Q. Thank you.

Now, before the December 22, 1994 date when your house was shot, your wife had told the police that she believe that the previous shootings were racially motivated; isn't that true?

[p. 17] A. No, that is not.

Q. Would you be surprised to learn, sir, that in a report of November 14, 1994 by the Vineland Police Department, there is included a statement by your wife that she felt that the shootings were racially motivated? Would that surprise you?

MR. LUTHER: Judge, I'm going to object at this point at to whatever his wife said. It's not on the scope of direct exam.

MR. O'NEILL: It doesn't have to be, Judge, to this issue.

THE COURT: I'm going to permit it.

The objection's overruled.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Would that surprise you, sir?

A. Could you repeat –

Q. Sure.

A. – the question?

Q. Would it surprise you to learn that in a supplementary report of the Vineland Police Department of November 14th, 1994, there is a statement attributed to your wife that the previous shootings were racially motivated?

A. Well, Joseph, I have to take a no-comment on that, because I was not there and I did not witness or hear my wife say anything to the – to that statement that you just said.

[p. 18] Q. Before December 22 of 1994, you and your wife, no doubt, discussed the previous shootings; isn't that so?

A. Yes, that is.

Q. Okay. And during at least one of those conversations didn't your wife tell you, "Michael, this is the product of racial motivation" –

A. No.

Q. – or something to that effect?

A. No, she did not, Joseph.

Q. Are you telling this Judge, Michael, that at no time before December 22 of 1994 did your wife tell you or did you mention to your wife that the previous shootings were racially motivated?

A. No, I did not.

Q. Did your wife mention to you that on November 6th of 1994 she had spoken with members of the Vineland Police Department?

A. Sir – Joseph, there were so many numerous officials that we talked to, I do not remember every specific individual that she talked to.

Q. Now, I know that –

A. People were coming in and out of the home.

Q. Well, I know that you and your wife are close, 'cause you and I know each other.

I want to ask you this, sir: On each of the [p. 19] occasions that you or your wife talked to the Vineland Police about this or these incidents, you discussed it with your wife; didn't you?

A. Yes, I did.

Q. All right. And what you're telling the Judge is that you don't know whether or not your,wife indicated these were racially motivated before December 22?

A. That is correct.

Q. All right. Now, the front door is, I think you said, a burgundy or purplish-reddish-brown-type of color?

A. No purple, no reddish. The door is burgundy.

Q. Well, burgundy is a sort of reddish-brown; is it?

A. That might be your interpretation.

Q. Well, give your interpretation.

A. Well, mind is it's burgundy, period.

Q. Well, what do you mean by burgundy?

A. The color burgundy.

Q. What – how would you describe that color?

A. As burgundy.

Q. Okay. If you were asked by the Judge, as I am asking you now, to tell us how to describe the color you have identified as burgundy, how would you describe it?

A. Well, I would –

THE COURT: Burgundy. He said burgundy.

MR. O'NEILL: I know. I'm trying to find out what it [p. 20] means to him.

THE WITNESS: I would address Your Honor and say that the color would be burgundy, period.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Whatever that is to you; right?

A. Correct.

Q. All right. Now, either you or your wife had an evaluation of property damage done to your house by Vaness (sic) Construction, is that correct – or Naness Construction?

A. Correct.

Q. All right. And you know that Naness has attributed to the shootings damage totaling some $6,085; right?

A. Correct.

Q. Did either you or your wife tell anybody in probation or the police or the Prosecutor's Office that you had insurance to cover that damage, absent of a $500 (sic) – or a $350 deductible?

A. Well, I cannot comment on that, because my wife takes care of the – mainly the paperwork and stuff at our house, sir. So, no, we didn't discuss anything like that.

Q. So, in other words, if your wife admitted that there was a $350 deductible and insurance took care of the balance of the damage, you wouldn't disagree with that; would you?

A. Well, that's a hypothetical question, Joseph. I really don't know. And, once again, I say no comment on that.

[p. 21] Q. You mean you can't answer the question; right?

A. I cannot answer the question.

Q. All right. As a matter of fact, Michael, you can't tell this Judge what damage was done to your home on September 24 or December 22 of 1994; can you?

A. That's incorrect, Joseph.

Q. Well, how can you differentiate? And I want you to answer this if you can. How can you differentiate what

damage was done to your house on either September 24, December 22, November 6th or November 8th?

A. The reason I can tell that – because I can physically see the damage.

Q. Can you tell this Judge what damage was done on either of those four particular dates?

A. Yes, I can tell His Honor that.

Q. Would you differentiate among them?

A. Okay.

Q. Tell us first what damage was done on November 8 of 1994.

A. Could I have the two – the two dates, 'cause I –

Q. November 8 of 1994, Michael. What damage was done to your house on that date?

A. Joseph, for me to answer that question I would need to know does that (sic) two dates in November that the shooting was. Because I know exactly what happened on the first [p. 22] shooting in November and I know exactly what happened on the second shooting in November.

Q. Well, Michael, are as you sure of the second and third shooting dates as you were of the fourth shooting date which you identified earlier today as December 23 of 1994?

A. I'm not positively sure on the dates. But I am positively sure on the month.

Q. Well, if you're not positively sure of the dates, you cannot, can you, tell His Honor what damage was

done to your home on any of those four specific dates; can you?

A. Joseph, I can tell the damage, not the dates.

Q. You can't tell what damage was done on any of those four dates; can you?

A. Yes, I can.

Q. Would you tell us, as I asked you before, what damage was done on November 8 of 1994?

A. And I would tell you – like I asked you before, if you could tell me the two separate dates in November, I can tell you what day that the damage happened on that date.

Q. Sir, all I'm asking you is to tell His Honor what damage was inflicted on your house on November 8. Yes or no, can you tell us?

A. And all I'm asking you, Joseph, is that I need the two dates to difference (sic) the damage that was done on each previous date.

[p. 23] MR. O'NEILL: Your Honor, would you instruct the witness to answer the question?

THE COURT: He says he can't do it without the information.

MR. O'NEILL: All right.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Let me ask you this: If I say to you, sir, that you allege that there was damage, even though you can't remember, apparently – there was damage on November

6th and November 8 of 1994, what damage was done on November 6th, if you can't answer as to November 8th?

A. Joseph, you know, you're –

Q. Can you answer the question, sir?

A. Yes, I can answer the question.

Q. Please do so.

A. Can you repeat the question, please?

Q. Yes. Tell His Honor and the rest of us what damage was inflicted on your house on November 6th of 1994.

A. Okay. And, once again, I ask you: Can you tell me what the other date in November was? That way I can disreate (sic) between the shootings.

Q. I already did that, Michael. It was –

MR. LUTHER: Judge, they were November 6th and November 8 of '94.

THE COURT: Those are the two dates.

[p. 24] MR. O'NEILL: I already told him that.

THE WITNESS: Okay; thank you, Your Honor.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. I already told you that, Michael.

A. November 6th, the damage on the house was a shot to the east side of the home on – on the-stucco; okay? And – and the later date was the frame in the family room window.

MR. O'NEILL: Judge, may I have this report submitted and marked as D-1 for identification?

THE COURT: Fine.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. All right. Michael, I show you what has been marked as Defense Exhibit D-1 for identification and ask you to look at it. Now, do you see where it says, "Item Number 1?" Do you see that?

A. Correct.

Q. Okay. That was the report that was rendered to you by Naness Construction, Inc.; right?

A. On – on December – after the December 22nd shootings, this – this full estimate is from the – the major shootings, from –

Q. Well, –

A. – the eight bullets.

Q. – specifically it says, "January 31 of 1995;" doesn't it? That's the date on it; right?

[p. 25] A. Correct.

Q. Okay. Now, can you tell His Honor what date – on what date the damage was done as to Item 1?

A. That – that was done December 22nd, 1994.

Q. Now, let me ask you, sir: What damage was done on – or what date was the damage done as to Item Number 6 indicated here?

A. That's (sic) was done on November –

Was it the 2nd, Robert?

Q. Well, you can't ask another person in the audience to answer your question.

A. That was done on November 2nd, right there, Joseph.

Q. All right. If I say to you, sir, that the police reports do not indicate that there was any shooting on November 2nd, 1994, would that surprise you?

A. Yes, it would.

Q. Thank you.

MR. LUTHER: Judge, the witness has already indicated he doesn't remember the dates and has to be supplied the dates.

MR. O'NEILL: Well, he was supplied the dates –

THE COURT: All right. Let's not – let's not –

MR. O'NEILL: – by both –

THE COURT: Mr. O'Neill, let's not argue. Let's continue with the questions.

MR. O'NEILL: I think that we've shown enough, Judge.

[p. 26] Thank you. No further questions.

THE COURT: Any redirect?

REDIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, do you still have bullet holes in your home?

MR. O'NEILL: That's irrelevant, Judge, whether they're repaired or not.

THE COURT: Sustained.

MR. LUTHER: Nothing further, Judge.

THE COURT: All right. Mr. Fowlkes, you can step down. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right, gentlemen. Any other testimony to be taken on the issue of the extended term?

MR. LUTHER: No, Judge.

THE COURT: All right. Do you gentlemen want to be heard?

MR. O'NEILL: Well, I do, Judge.

THE COURT: Okay.

MR. O'NEILL: If Your Honor pleases, the criteria for sentencing to an extended term under N.J.S.A. 2C:44-3(e) is invalid because it's based on proof required by the statute by a test or a standard known as by a preponderance of the evidence.

Now, we've briefed this, Judge. We've submitted three briefs. And the essence of the briefs is simply this;

Colloquy

[p. 27] that traditionally in the criminal law all essentials need to be proven by the State. Must be proven by not a preponderance of the evidence, as is indicated in the statute, but by the time-honored going through English and American history standard of proof beyond a reasonable doubt.

Now, there is a case of *State versus Des Marets* on 92 New Jersey, Page 62. That has to do with the Graves Act. And Your Honor is familiar with that case. And it says – written by Chief Justice Wilentz – that there's only a showing required of possession of a firearm by a preponderance of the evidence.

Now, that is very distinctfully (sic) different from our case here because, as Chief Justice Wilentz stated at Page 69 of his opinion, that the statute itself strongly suggests that the actor's state of mind was meant to be irrelevant. The quote, Judge, is – strongly suggests that the actor's state of mind was meant to be irrelevant.

Now, that's very, very different from what confronts the Court here today. Because the *mens rea* or the guilty intent is absolutely required to be proven before the Court can determine whether or not a crime committed was racially biased or racially motivated. The specific intent of the defendant is required to be proven contrary to *State versus Des Marets*, where there was no intent required to be proven beyond a reasonable doubt because the actor's state of mind, the [p. 28] defendant's state of mind, in the words of the Chief Justice, was meant to be irrelevant.

Here, you can't decide this case unless you can decide what was in the mind of this defendant at the time he committed those two crimes. And that has to be not by a mere preponderance of the evidence, not by clear and convincing evidence, but by the time-honored standard of proof beyond a reasonable doubt.

That's the difference here, Judge. It requires you to assess in this case the mental state, the intent of the defendant. Before you can determine whether the Prosecutor has proved what he must prove for the Court to sentence this man to an enhanced penalty, he's got to prove beyond a reasonable doubt that there was racial motivation involved in the activities engaged in by this defendant.

And I can go on and on and on. But I think as stated in our briefs, Judge, encapsulated, that's what the position of the defense is as to the standard of proof. That statute is wrong. It's invalid. It can't be used in this case.

MR. LUTHER: Judge, just briefly on the issue of whether or not the statute is constitutional. Again, I've already submitted a brief. But beyond a reasonable doubt only applies to elements of a crime. It does not apply to sentencing provisions.

The Supreme Court in *State versus Mortimer* addressed [p. 29] identical language in the bias harassment statute and found it to be constitutional with certain language excised. And as detailed in my brief, the State respectfully submits that certain language be removed from the extended term statute in accordance with the Supreme Court's ruling in *State versus Mortimer.* As such, the statute would be constitutional.

Would the Court also wish to hear argument at this time as to why an extended term should be granted?

THE COURT: Certainly.

MR. LUTHER: Okay. Judge, first let me just deal briefly with the defendant's arguments. The defendant contends that he did not act out of racial bias. But, rather, says that he was drunk and under the influence of drugs.

Now, first of all, Judge, this completely contradicts what he told the police. He told the police when he was arrested that he was not under the influence of drugs and that he was not drunk. He had taken some over-the-counter medication for his stomach, I believe. And he had taken – had one or two drinks at the Greek Island Restaurant between 10:30 and midnight. That's what he told the police that evening. He did not appear drunk.

And then on September 5 of this year he testified under oath that he was under the influence of drugs and also drinking. However, he said that the last drugs he took that night were at 8 p.m. He spoke with the police at 6 a.m. And [p. 30] he admitted that he acted out of racial bias. That's ten hours after he took [t]he drugs. He admitted that his last drink was at 1:30 in the morning. That's four-and-a-half hours before he spoke with the police. So I would submit that the evidence is clear that he was not drunk or under the influence of drugs.

Also, Judge, you have to look at the purposeful and planned nature of his conduct. Judge, if I could just show the Court the rifle that Mr. Apprendi used that evening. It wasn't just a regular rifle, Judge. He had a homemade

silencer attached to the end of it. And not only did he have a homemade silencer, but he had a scope, as well. This scope is what he referred to as a toy in his testimony. He also called the silencer a toy when he testified before this Court.

Judge, this is not just an ordinary scope on a rifle, it's a laser scope. And if the Court would look at the wall over there, I've got the scope on right now. There's a red laser beam which is on the wall of the court showing that this type of weapon is deadly accurate. And I would submit that this shows that this defendant was not drunk or under the influence of drugs when he was firing it repeatedly at the Fowlkes residence on December 22nd, 1994. He knew exactly what he was doing.

MS. FOWLKES: Amen.

MR. LUTHER: He had the silencer on the gun to avoid apprehension.

[p. 31] MR. FOWLKES: Uh-huh.

MR. LUTHER: He had the scope on the gun to make sure that he hit his target. And hit his target, he did, repeatedly. Numerous shots going through the front door of the home, including hitting the black Santa Clause [sic] which was on that front door.

Judge, the defendant says there was no racial animous (sic) here. He was just driving by the home and the purple door caught his attention. That's what he tells the Court; okay?

First of all, Judge, the door's not purple; it's burgundy. But even if the Court thinks burgundy is similar to purple, the more important point is that most of that

door was glass. There was only a 6-inch wooden border around that door; okay? The door and the house sits a-hundred-and-eighty-feet from the roadway. So what was it that Mr. Apprendi saw on that door that caught his attention? Judge, it wasn't the color purple. It was that black Santa Clause [sic] on the door that caught his attention.

The defendant contends he doesn't walk around making racist statements. Therefore, the State hasn't proven he acted with racial bias. Judge, most racists don't walk around making racial statements all the time.

More importantly, the State doesn't have to prove a history of racism. Rather, the State just has to prove that [p. 32] the criminal acts that this defendant committed were done with the purpose to intimidate based on race. And I think the State clearly has met that burden.

One other point raised by the defense. The defense called Dr. Cooke. Dr. Cooke testified that the defendant is easily led and just said what (sic) the police – just said to the police what they wanted to hear. Judge, he had four shootings here. The defendant only admitted to two of them to the police. So if Dr. Cooke's testimony is to be believed, then this defendant would have admitted to all four of the shootings.

Judge, I think the evidence overwhelmingly shows that the only possible motive for this crime was that he acted out of racial bias.

First of all, in this case – most cases the State does not know the intent of the defendant. Most cases the State doesn't know that.

This case is different. The defendant told us why he did what he did. He admitted to the police – he said, "Look, nothing personal against the Fowlkes. I don't even know them. The reason I did this is because they're black and I don't want blacks in my neighborhood." So this defendant admitted the reason why he committed this crime.

The Fowlkes family is the only black family east of Lincoln Avenue in the City of Vineland. That's a two-mile [p. 33] stretch on Chestnut Avenue where both Mr. Apprendi and the Fowlkes resided. Mr. Apprendi said when he testified that he was only aware of one other family – one family, period, on East Chestnut Avenue that was black. He thought their name was the Lakes. He described the house as having a wagon wheel in front.

And Mr. Fowlkes just testified that the family that resides there is a white family.

More importantly, when Mr. Apprendi spoke with the police he admitted that he knew that black people lived at that residence that he fired at. And the reason he knew this was because he had frequently seen them out in the yard prior to the shooting. So that, therefore, he knew that a black family resided at that address.

Mr. Fowlkes just corroborated that testimony in his testimony this morning, indicating that frequently he and his children would be outside the home.

Mr. Apprendi claims this was not racially motivated. Judge, very importantly, this was not an isolated incident. This happened more than once. Was it just random chance happening over and over again that the Fowlkes

family just happened to be fired at by Mr. Apprendi? I don't think so, Judge. I think it's clear that the reason was racially motivated.

Finally, Judge, you have the black Santa Clause [sic] which [p. 34] was on the door. It's pretty clear, Judge, that that was the target that Mr. Apprendi was shooting at on December 22nd. December 22nd is the count which is subject to the motion for extended term. Not only was he shooting at that black Santa Clause [sic], Judge, but Mr. Fowlkes testified that the bullets actually hit that black Santa Clause [sic].

Judge, frankly, there's no other reasonable explanation why Charles Apprendi, who did not know the Fowlkes – the Fowlkes did not know him – why he would repeatedly fire at their home. There's just no credible, rational reason, other than they were black. And, as Mr. Apprendi said, he wanted to send them a message that he did not want them in their (sic) neighborhood – in his neighborhood. Excuse me.

THE COURT: Mr. O'Neill.

MR. O'NEILL: If Your Honor pleases, if I may, I'd first like to treat the issue which first confronts the Court here today, that raised by the Court, that as to the standard of proof required of the prosecution before the Court could consider applying a racially motivated or bias to a crime so as to enhance the sentence.

Now, I invite the Court's attention to the Supreme Court decision in *State versus Biegenwald*, which appears at 106 New Jersey 13, decided in 1987. And specifically at Page 59 of that opinion, the Supreme Court construed the

statutory language pertaining to weighing aggravating and mitigating [p. 35] factors. And that's what we're doing here, Judge, as you know better than I, in sentencing somebody. Before the Court can sentence someone, you have to consider – as, again, you know much better than I – the weight of the aggravating and mitigating factors.

In dealing with that issue which is again before you today, the Supreme Court said in *Biegenwald* that the Supreme Court Approached the construction of the statutory language, quote, "With a long-standing practice in the criminal law of this State that the State has the burden to prove that element beyond a reasonable doubt."

Judge, if you look at *Des Marets* and acknowledge as Chief Justice Wilentz did at Page 69 that the statute itself, quote, "strongly suggests that the actor's state of mind was meant to be irrelevant" – so the argument by the State that they don't have to prove beyond a reasonable doubt that there was racial motivation is bogus. I think the Court has to be bound by the Supreme Court's decision. The Supreme Court made that differentiation in stating very clearly that in *Des Marets* the state of mind of the defendant was irrelevant.

In this particular case, the *mens rea*, the state of mind of the defendant, is not just relevant, it is essential so as to be evaluated by the Court.

So, therefore, the statute is wrong. It flies in the face of the law. In fact, New Jersey Rules of Evidence, [p. 36] 101(b)1, in defining what constitutes burdens of proof, it

indicates on Comment 7 that, "In criminal case the standard comprehended by this rule is that of, quote, 'beyond a reasonable doubt.' "

Judge, going back to long before the colonists wrote up the laws, long before the courts of yore decided cases in the State, coming down through the Blackstone tradition, the burden of proof on the State is to prove anything involving the mind of a defendant. The reasons why he or she did something always must be proved beyond a reasonable doubt.

And that's what they have to prove here today. They haven't done it.

Now, let's talk about the facts of this case, Judge.

The Prosecutor grandly brought out this rifle and pointed out to all of us that it has a laser beam on it. Now, if the defendant wanted to harm these people with a laser beam he certainly could have done so. He didn't have to do so in the wee hours of the morning of (sic) any of those dates. He could have done so in the daylight where the laser beam could have directed his rounds, his cartridges, into the bodies of any one of these poor victims. He didn't do that. Doesn't that really suggest that there's not a reason behind what he did to harm somebody? It's something inexplicable as to normal people. This man is not a normal person. We have uncontroverted testimony by Dr. Cooke, the professor at the [p. 37] University of Pennsylvania, that he has problems. He has problems forming judgments. He makes mistakes as to judgment. He does it because this is the way he thinks. He needs therapy. He needs treatment. Now, when you combine

that preexisting condition of his mind with the synergistic or intertwining of facts of alcohol and drugs, then you have a worse situation for a man, as this man is, who has problems with judgment.

Now, let's talk about, for a few minutes, if the Court will indulge me, as to what happened on the morning of this December 22 of last year. We have a situation where Dr. Cooke has already testified and written in his report that this man, with this type of mind that has, is much more likely to be coerced, to be led into saying things that he does not believe. That remains uncontroverted. There was no report submitted by an expert for the State. There was no testimony produced by the State to be at odds with that opinion uttered by Dr. Cooke.

The testimony was that this man, after imbibing in alcohol and drugs over many, many hours, did a very foolish thing, albeit a criminal thing, a wrong thing to do. But in sentencing this man the Court must look at all of the circumstances. In the words of the Court, the totality of the circumstances. It's not enough to say, to hear, to read, that a house was damaged. It's not enough to say a police officer testified that this man told him that he did this act or these [p. 38] acts because he didn't want blacks in the neighborhood. That's reprehensible to me and to any logical-thinking person in this day and age. It's plain wrong. The reasons why it was uttered, the reasons why it was wrong, lie in the head of this man, which really has been examined at length by Dr. Cooke and not by anybody for the State.

Dr. Cooke not only interviewed this man at length, he gave him four scientific tests. He had for his own review

– which he did, in fact, read and study – all the records of the Vineland Police Department, the indictment, medical notes from the jail, and so forth and so on. He had all of that discovery information. He testified that this man has evidence of being hypomanic. He testified that this man has had a drinking problem since he was age 19 when he was subjected to the pressures, the anxiety, of pharmaceutical school. He handled it the wrong way. He did a lot of crazy things.

You heard testimony on September 5 from people who knew him. Among whom was his best friend, who submitted a report to you, who submitted testimony to all of us, of the goofy, wrong, silly, stupid, lacking-in-good-judgment things, that this defendant did. Not out of malice or hatred, but because he exercised poor judgment.

The doctor rendered the opinion that there is a pattern of alcohol abuse. He also stated that he clearly has a pattern of drug dependence. This started due to the pressures [p. 39] of pharmacy school. They were made worse by his gastrointestinal problems to combat the pain. He, unfortunately, became drug dependent. When mixed with alcohol, as the doctor testified uncontrovertedly, it becomes worse. His poor judgment becomes even worse.

The testing, the objective testing – not merely the interview or the clinical diagnosis, but the objective testing as testified to by the doctor and as appears on his (sic) – Page 6 of his report indicate (sic), quote, "Considerable pathology." Meaning, as Your Honor knows, there is something wrong up there. Obsessive-compulsive traits are evident on the testing, as they were on the interview.

He testified to that. Nobody said anything different. When he is disinhibited by drugs, alcohol, or emotional stimulation, then his condition becomes even worse.

His diagnoses where obsessive-compulsive disorder, psychlosymic (phonetic) disorder, drug dependence, alcohol abuse.

He testified it was his opinion that at the time of the incident last reported upon, that the defendant suffered from these disorders. As a result of these disorders, his judgment and his impulse control were substantially impaired at the time. He certainly knew that he was discharging the weapon toward the house and that it was wrong. Therefore, he does not meet the criteria for insanity. However, the testing clearly [p. 40] shows that his anxiety can disrupt his attention, his concentration, his perception, his judgment, and his impulse control. These characteristics make him far more suggestible and far more easily coerced than the average individual.

He testified also as he stated in his report on Page 8, that "I can offer the opinion that he is far more likely to admit to things that he did not do than would be the average individual. He has a strong need to remove himself from emotionally-stimulating situations. And if he believed that telling the police things that would satisfy them would get him out of the situation, he would be quite likely to do so."

Now, if we take the report of the expert, uncontroverted opinion, put it together with what happens when questioned – when the defendant was questioned by Detective/Sergeant D'Augostine, we can never like – no thinking person can ever like what this man said as

the reason why he did these things. But we can understand them, even though they are wrong. It gives us an inside view of the mindset of a man who would do things like this. And admit them!

Now, this defendant sat before Your Honor under oath and he showed very graphically the proof of the doctor's differential diagnosis as his (sic) condition. He told a real good story, in my humble opinion, before the Prosecutor said to him, "You lied to the Judge."

[p. 41] And he said, "Yes, I lied to the Judge."

"You lied to the Judge."

And he admitted it. Why? Because he's that way. He will say things that are untrue to get himself out of – as the doctor said, get himself out of the situation. He would tell people things that weren't true to remove himself from an emotionally-threatening situation.

When Detective/Sergeant D'Augostine, who is a fine officer and a very effective examiner, by the way – and you probably know that like I do – when he told this man, "You did it because" –

The average person is going to say, "No, I didn't do it. That's not true."

But he's not the average person. If we can understand what the doctor's diagnosis, the doctor's explanations for his reasons are, you, the sitting judge, can understand why he sat on that stand and answered the same questions that I put to him differently from how the Prosecutor put to him. Why? Because he has this impaired judgment which, on the incidents in question,

was made worse by the synergistic effect of the drugs and the alcohol.

Now, Judge, before you render a sentence, I would like to make some comments pertaining to the Pre-Sentence Investigation Report, which I –

THE COURT: Well, I'll let you do that when I [p. 42] announce the decision on whether an extended term –

MR. O'NEILL: Thank you, –

THE COURT: – should apply or not.

MR. O'NEILL: – sir. That's – I just –

THE COURT: All right.

MR. O'NEILL: – wanted to reserve my rights on that.

THE COURT: And if you're finished with that aspect of it, then I'll make my decision known. And then you can address the sentencing –

MR. O'NEILL: Very good, sir.

THE COURT: – issue.

MR. O'NEILL: I'd like, also, with the Court's permission, time to address aggravating and mitigating factors if I may.

THE COURT: Absolutely.

MR. O'NEILL: So let me wind this up, Judge. I've had a lot of cases, you've had a lot of cases. I don't know if you've ever had a case like this, but I never have.

We came forth directly and said, "There is no insanity defense in this case." He knew the difference between right and wrong, but he did not see things the way you and I and Bob Luther see things He didn't see things the way Michael Fowlkes or Mattie Fowlkes see things. Because, hopefully, the average person would consider all of us normal. He's been identified by a doctor as being abnormal, as needing help. He's got to go to jail. He [p. 43] understands that. But does he have to go to jail for admitting something as a reason for committing these crimes, when we all know full well that that's a lie, it's wrong, because he doesn't have good judgment?

The cop says to him – and the cop remembered, had to know – he had to know that Ms. Fowlkes earlier, before this defendant was apprehended, had attributed racial bias motivation to the commission of these crimes. He had to know that. He said to the defendant, "You did it 'cause they were black. You did it 'cause you didn't want them in your neighborhood."

And, foolishly, as he said to you and to Bob Luther on the witness stand, "Yes." Why? Because he wanted to remove himself from an emotionally-threatening situation. "I'll tell them anything they want to hear so I can get out of here so they'll go easy on me."

Now, you know, you and I know – and I'm sure Mr. Luther knows – there are times when people trained in the law, judges, lawyers, say things they shouldn't say when they're accused of things, even if they didn't commit those things. Why? Because they are emotionally threatened. These people, we can assume, I hope, are rational, thoughtful, reasonable, regular people.

This man is not. He's not any of those things. And if we look at the report given by Dr. Grill (phonetic), [p. 44] indicating the life expectancy of the various drugs taken by this defendant on the night before and the morning of this incident, we can understand. For example, he said that Ativan has a life – a half-life of 10 to 20 hours. He goes on to talk about Dilaudid. Then he talks about Lomotil and the other drug the defendant took.

Judge, we're not dealing with a normal person. We're dealing with a person who if he's threatened, he wants to remove himself from a threatened atmosphere, will say almost anything, even if it's not true, to get out of it. If he thought when Mr. Luther was cross-examining him and when you were asking him questions that if he gave you what he wanted – Mr. Luther wanted or what you wanted – he would be – got off that stand and removed from the situation quicker than he would do it because he can't handle stress. And that's why he said those things.

You heard and you saw the testimony, the affidavits under oath, of the African-Americans who testified they've known this man for three years, going back to when he was a baby. Been in the family home on many occasions with him. Never saw any incident involving racial bias by this man. They bowled with him. He invited one of the black men over to his house for Super Bowl parties. They went out drinking and eating after bowling. They socialized regularly. He worked with these people. Never did any one of them see any evidence [p. 45] of racial bias. Here are people who put their relationship with their community, with our community, on the line to tell you what's right, so that you can make the right decision here, which is to find that, A, the law is

invalid. There is no proof required by a preponderance. It has to be beyond a reasonable doubt.

Two, that this man cannot be believed. What he said under stress to the detective, that he did it because he didn't want blacks in the neighborhood, when the detective knew or had to know that the prior assigned (sic) reason for the shootings was racial, as indicated by Ms. Fowlkes.

So, therefore, Judge, in conclusion as to these issues, one, the law is invalid. And, Two, as the defendant lied on the stand as to whether he remembered – he didn't remember something. He also lied to Detective/Sergeant D'Augostine because he wanted to remove himself from those emotionally-threatening circumstances.

Thank you.

THE COURT: Very well. Gentlemen, as you're well aware, the statute which we're talking about, 2C:44-3, provides for an enhanced penalty when the Court is satisfied by a preponderance of the evidence that the actions of a defendant are motivated by racial bias. Now, the statute does not make speaking eligible for enhanced penalty. What it makes eligible for an enhanced penalty is some action on the part of the [p. 46] defendant that causes harm to someone else or some other persons or property.

And I think the Court can quickly dispose of the argument that the statute's unconstitutional. I'm satisfied that this case of *State versus Des Marets*, 92 New Jersey, Page 62, a 1983 case, which was authorized by Chief Justice Wilentz, is not applicable to that argument.

The Court in that case said that the actor's state of mind was meant to be irrelevant. It was then talking about the Graves Act. With regard to elements of a crime, there is no question about the fact that those elements have to be proved to the satisfaction to the trier of fact by proof beyond a reasonable doubt.

But the issue here is one which the Legislature has left to the discretion of the Court. And if the Court is satisfied by a preponderance of the evidence that there is racial motivation in the actions of a defendant, then the Enhanced Penalty Statute is applicable.

My notes indicate that both parties agreed that the *Miranda* warnings were given and that the statement given to the police was voluntarily and knowingly given.

The defendant contends that portions of the statement, wherein he admits that the shootings resulted from racial bias, were not true. He maintains that the suggestion of racial bias first came from the interviewing officer. And [p. 47] that, furthermore, he did not know until being questioned at the police station that the house at which he fired was the residence of African-Americans.

Now, to support that contention, the statement he gave to the police was not true, there was introduced to the Court testimony of a Dr. Gerald Cooke, a clinical and forensic psychologist. The doctor apparently interviewed the defendant while he was incarcerated in the County Jail. And his ultimate opinion was supported by the results of that interview, the doctor's review of police reports, and the administering to the defendant of a series of personality tests.

The doctor found that the defendant was heavily into drugs and alcohol. Found him to be, among other things, anxious, insecure, with feelings of poor self-image and inadequacy. The doctor, furthermore, found the defendant to be obsessive and compulsive. And I'm reading from his report, "And one who projects his problems onto others. That he becomes very angry when under the influence of alcohol."

And here the defendant says that he was under the influence of alcohol, having had a number of drinks prior – shortly prior to the incident.

Now, the doctor's opinion is supportive of the defendant's condition that he lied to the police merely to extricate himself from an uncomfortable situation. In other words, to stop the interrogation.

[p. 48] Dr. Cooke candidly admitted, however, that he could not tell if Mr. Apprendi was, in fact, now telling the truth about his motive for firing at the house. The most that the doctor said that he could opine was that the defendant's lying to get out of an unpleasant situation would be consistent with his test results. In other words, consistent with personality traits revealed by the tests.

The testimony of the defendant before this Court earlier this month is that the first suggestion that he might have acted out of bias came from the interrogating officer. And that to quickly end the interrogation, which he apparently found seriously unpleasant, he adopted the police officer's suggestion by admitting that he fired at the house because it was occupied by Afro-Americans. He buttressed his testimony that he – that the police made the suggestion by saying that the police described

to him the horrors of jail. And, thus, making him even more pliable. He denies ever having any bias toward blacks.

The officer, Dennis D'Augostine, denied that the police planted this bias motive. The police report itself reflects that the defendant admitted knowing black persons lived at the house because he had seen them outside. That's what he told the police on the night of the interrogation. An that he was giving them a message by firing at the house.

Now, the testimony of the officer is corroborative of [p. 49] the report. And, furthermore, the defendant, according to the report (sic) – according to the testimony of the officer, did not appear intoxicated. He answered the questions clearly, according to the testimony of Detective D'Augostine. And, furthermore, the detective's testimony – I think the report reflects that questioning ceased when the defendant requested counsel.

Now, the Court heard testimony and received letters from acquaintances, friends and relatives, all to the effect that the defendant was not a racist and that he never expressed racial remarks. And that he is not racially biased. Some of these letters and reports came from black persons. An affidavit – in the form of affidavits and letters.

And I might say in passing that I think everybody here recognizes the fact that persons who have racial bias don't wear that bias as some badge of honor. I mean, the remarks that people make of that nature – those remarks are protected by the First Amendment – usually are done behind closed doors. And people just don't take action on

those (sic) bias. So that these people who submit these letters don't know, obviously, what has gone on in the mind of the defendant.

Now, at the entry of his plea of guilty before this Court on July the 24th, the defendant under oath said that the purpose of his firing the gun was to scare someone.

And I refer you gentlemen to the transcript. I [p. 50] ordered a copy of it. I think I sent you copies of it. Page 13, Line (sic) 1 through 4, and Page 28, Lines 19 through 25.

Now, since then the defendant has written to the Court three or four letters since the entry of his plea. And all those letters were shared with both the prosecution and defense counsel. And those letters, at least in part, attempt to negate what the defendant purportedly told the police and what he told the Court under oath when he entered his plea.

And his newly-adopted position is that he never intended to scare anyone when he fired the shots. That he was not clear on (sic) July – in July when he – because he was "overwhelmed with lawyers and detectives" – and I quote from the letter – "and prosecutors, and he wasn't thinking clearly." His present position, or at least his position in the letters, is – as I understand it, is that he fired the shots only to break something.

And I might say that we didn't have before us – or I didn't know – that the door of the Fowlkes residence was not purple, as described by the defendant. It was almost totally clear glass, according to Mr. Fowlkes this morning,

with a 3-inch burgundy border. So I, quite frankly, have difficulty in believing that the defendant was attracted to this door by the color. And that something went off in his mind under this (sic) – in his intoxicated state of mind that he wanted to destroy the door.

[p. 51] Now, the Court finds the testimony of Detective D'Augostine to be credible, believable. And there's no reason to believe that the police initiated the idea of the reason for firing the gun.

Both sides, in stipulating there was no *Miranda* issue, impliedly conceded that the questioning by the police was not overbearing. It was not onerous or is not in any sense dictatorial. That it was relatively brief. And evidence that it was not burdensome can be taken from the fact that the questioning stopped when the defendant requested a lawyer. One need look no further than the defendant's own statement to the police and to the Court to be satisfied that the crime was motivated by racial bias. The defendant contends that he did not know that blacks resided in the home.

And the question has to be asked, as I think Mr. Luther asked it this morning: Why then did the defendant pick this particular target out not once, but at least twice as his target? No other Afro-Americans lived in the neighborhood. His excuse that he became incensed by the door and its color is bizarre and not accepted by the Court, particularly in light of Mr. Fowlkes testimony this morning.

The Court's satisfied that at the entry of his plea he once again admitted his motive. And is trying by his

letters to explain away his statement so as to avoid the punishment for a biased crime.

[p. 52] I went to the trouble, quite frankly, gentlemen, of ordering the tape of the plea. Those proceedings lasted approximately 30 minutes. And there was nothing in that proceeding that was so overbearing as to cause the defendant to misstate his plea, which he is attempting to do through the use of these letters.

The defendant has presented himself as articulate. He's intelligent and in full control of his faculties. He's educated. And the Court is satisfied that the defendant said and meant what he said when questioned by the police. And I'm satisfied that when the Court took the plea that he said what he meant and meant what he said.

Accordingly, the Court finds the standard of proof required by the statute has been met. The defendant is subject to enhanced penalties.

Now, that's not to say that the defendant's without psychiatric problems. I think any fair reading of Dr. Fowlkes (sic) – of Dr. Cooke's report would indicate that he's got serious problems that may have been [ex]acerbated by the use of alcohol and drugs. But the use of alcohol and drugs and the treatment of his psychiatric problem is a medical problem. The Court can't treat medical problems. All I can do is attempt to treat the social problems.

And let's not forget that the intoxication allegedly that the defendant was under is not alleged in this case by way [p. 53] of negating purposefulness or knowledge. That would have been a defense if this case had been

tried, but it wasn't urged as a defense. The defendant in this case has pled guilty.

The Court's satisfied that it was an appropriate plea. And in fashioning the sentence I'll take into consideration the psychiatric problems.

The State has an interest in protecting its citizens from crimes of this nature. And the Court has dictated an extended term. It's not discretionary, it's mandatory once that threshold question's been answered. And I intend to impose the enhanced penalty.

Now, I'll hear you on sentencing.

Let me tell you something.

MR. O'NEILL: May it please the Court,

THE COURT: Now, let me tell you. And I address this to your client. I mean, if – you read the Fowlkes letter. It's part of the plea sentence agreement. I mean, can you imagine the terror of somebody living in their house and having shots fired at? And, obviously, just because they were – and I think the – Ms. Fowlkes wrote the letter, because they – it had something they couldn't control, which is the color of their skin. I mean, it's frightening.

But go ahead, Mr. O'Neill.

MR. O'NEILL: May it please the Court, first I'd like to address the Pre-Sentence Investigation Report, which really [p. 54] requires some comments.

Number One, the statement as to the plea agreement is incorrect. Your Honor, of course, is going to go by the

plea agreement negotiated between Mr. Luther and me, and as agreed to by the defendant. But it is wrong. It's not correct to say that it's up to 20 years in State Prison with ten years of parole ineligibly [sic] as to Count 18. I could go on about that, but it's – I know the Court will take the actual plea and not that which is included within.

THE COURT: Well, I'm – are you telling me that the plea agreement, as I read it, where it says, "The State reserves the right to speak and ask for the maximum extended term sentence on Count 18 of 20 years New Jersey State Prison, ten without parole" – and then it goes on and talks about the other counts – that's not correct?

MR. O'NEILL: No, it says that the – the plea agreement was that the Court (sic) – that the Prosecutor argued for that. He can argue for that. But it's within the discretion of the Court. That's what I'm saying. It's not –

THE COURT: Right; okay.

MR. O'NEILL: – not correctly stated.

Now, then there's a – the question that really puzzles me, Judge, and that is this. That Mr. Luther's brief was included within the PSI. None of the defense's three briefs was included. I don't know why. But it troubles me.

[p. 55] THE COURT: I read all of your briefs. I didn't – I think his brief on the sentencing was submitted before I even looked at the PSI, I believe. But, in any event, I read them all. So I didn't give any particular weight to when his brief was submitted or if it was attached to the PSI. And it probably ought not to be attached to it. And I'll have them direct the Criminal

Court Management Office to take it off of the – out of the PSI; fair enough?

MR. O'NEILL: Yeah, Judge, 'cause I've never seen it before. I thought it was, you know, fairer to one side –

THE COURT: You never saw it before?

MR. O'NEILL: No. No, I never saw a Prosecutor's brief enclosed within a Pre-Sentence Report.

THE COURT: Okay; but you've seen the brief before today?

MR. O'NEILL: Well, sure I did. I –

THE COURT: Okay.

MR. O'NEILL: – responded to it.

THE COURT: Great.

MR. O'NEILL: But then as to the restitution issue, Judge, there's the estimate that was brought out and became the subject of D-1, the Naness Construction report indicating the amount of the damage. But it's not in accordance with the police report.

There's also the situation in reference to the [p. 56] applicability of insurance and the fact that other than a $500 deductible – apparently from what I can glean from the documentation, the balance of the damage is covered.

Now, finally, Judge, and perhaps most troubling to me, is that none of the 29 character reference letters submitted by us to the Court, to Criminal Case Management, to probation, was included within that report. And that's wrong, too, I submit.

THE COURT: They were sent up to me earlier this week with the report. I don't think they were attached. But they're –

MR. O'NEILL: They were not.

THE COURT: – a separate packet. And I've read them.

MR. O'NEILL: Now, with Your Honor's permission I'd like to address the aspect of mitigating circumstances. I respectfully submit, Judge, that the second mitigating circumstance is one that should be considered by you because the defendant really did not contemplate that his conduct would cause or threaten serious harm.

And I call (sic) the Court's – or invite the Court's attention to the demonstration by the Prosecutor with regard to the laser beam (sic) – the laser sight on the rifle. If the defendant, having this knowledge and involvement with weaponry really wanted to harm somebody – and if you're (sic) intended [p. 57] to use that type of a sight, he certainly could have done so, rather than just firing shots apparently haphazardly.

Now, insofar as the diagnosis by the doctor, including obsessive-compulsive disorder and psychlosymic disorder, drug dependence, and alcohol abuse, impulse-disorder kleptomania, and so forth, these orders (sic) – these disorders, coupled with the drug and alcohol intoxication, as Dr. Cooke testified to on September 5 and as appears in his report of May 14 on Page 8, resulted in a substantially impaired judgment and impulse control.

These prevented him from contemplating that his conduct would cause serious harm to the residents of the house.

Now, he testified, the defendant did. He told the doctor that he was attracted not by the appearance of black people in the premises, but really by this door. But, Judge, in – I think the important, the salient part, of this Mitigating Factor Number 2 would be that putting everything together, the totality of the circumstances, if you will, that it's uncontroverted that this man suffers from substantially impaired judgment and impulse control. And these are the reasons why he does the things that we think are so wrong – are so wrong. That's why he does them. And I think the Court should take that under consideration in passing sentence.

The next mitigating circumstance is Number 4. The doctor made it clear that there is not insanity here. But [p. 58] because of this preexisting problem that this defendant has, he suffers from self-defeating psychological disorders.

Now, you witnessed these firsthand when you saw him testify on the 5th of September. When he testified he had to know that one of the purposes in addressing the Court was to establish credibility in view of what he said to Detective/Sergeant D'Augostine. It seems to me, Judge, that the testimony of the defendant before you substantiated what happened in the presence of Sergeant D'Augostine. The man acted in accordance with the diagnosed problem of substantially impaired judgment and impulse control problems. He didn't respond the same way to your and the Prosecutor's questions as he did to

my virtually the same questions. And that's significant. It shows that the doctor is right.

Mitigating Circumstance Number 7, Judge, the defendant has no prior history of delinquency or criminal activity. He's never been convicted of a crime.

Number 10, the Pre-Sentence Investigation reports on Page 8 that the defendant would respond favorably to rehabilitation. I submit that that's very important.

Number 11, this is a problem in the sense that not only does he have these gastrointestinal problems – and the longer he's away the more likely it is that they're going to get worse. Your Honor has already decided to sentence him under the racially-enhanced statute. Therefore, if his fellow [p. 59] inmates at the prison become aware of this, he might be subjected to some danger.

Number 12, it's indicated by the Pre-Sentence reporter that the defendant was cooperative with law enforcement authorities.

Judge, this is a situation, as I indicated earlier, in which there is no question that jail is necessary. Society has to understand that people who commit crimes must be punished for them. In this particular instance jail is appropriate. But I suggest to the Court that you might well consider the length of the sentence in terms of the totality of the circumstances that have been brought before you.

Most significantly, that testified to by the doctor, uncontroverted as to the reasons why this man has done these bad things. Lack of good judgment, lack of impulse control, the synergistic effect of the drugs, the alcohol, the

lasting effect of the drugs, as indicated by Dr. Grill in his letter.

Judge, putting these things all together, I would suggest that the term imposed by the Court should not be the maximum term. It should be a term in keeping with the circumstances here. A term in keeping with his mental condition and his propensity for rehabilitation, as indicated in the Pre-Sentence Report.

Thank you.

THE COURT: What's your position with regard to the [p. 60] applicability of the Graves Act? No question in your mind that that applies; is there?

MR. O'NEILL: No, Judge, there's no question. It's mandatory. We know – and I've explained to the defendant what happens when there is a crime involving the use of a gun improperly. He understands that mandatory aspect of that, Judge.

THE COURT: Fine.

Mr. Luther.

MR. LUTHER: Thank you, Judge. Judge, I'll be brief, I've already submitted a brief to the Court addressing the aggravating and mitigating factors. I'll rely on that.

Just briefly, Mr. O'Neill indicates Mitigating Factor Number 2 is present here, that the defendant did not contemplate that his conduct would cause or threaten serious harm. Judge, I think clearly that that's not applicable.

September 24, the bullet that was fired entered a bedroom window where 8-year-old Michael Fowlkes was sleeping. It was later recovered in the hallway of the home. And December 22, there were numerous bullets, a veritable barrage of bullets, that were fired at the house, most of which, again, entered into the premises of the home. One of the bullets actually lodged into Dawn Fowlkes bedroom wall. So to say that he didn't contemplate that his conduct would cause or threaten serious harm is just not accurate.

[p. 61] And that doesn't even get into this psychological damage that the Fowlkes have suffered as a result of these attacks.

Mr. O'Neill also indicates that the defendant would respond affirmatively to probationary treatment. Judge, I don't think that that factor should be found here. First of all is the repetitive nature of this crime. This was not an isolated incident. This happened on more than one occasion. And, also, Dr. Cooke, the defense's own psychologist, indicate that the defendant is unpredictable and should be watched carefully.

So that's all that the State has to add at this point about aggravating and mitigating circumstances.

Judge, Mattie Fowlkes submitted a letter to the Court. I'm sure the Court has read it.

THE COURT: I've read it.

MR. LUTHER: But at this time Michael Fowlkes would like to address the Court.

THE COURT: Very well. Mr. Fowlkes, you can do it from right there; that's fine. The microphone will pick your voice up.

MR. FOWLKES: Robert, can I talk to you for a second,

MR. LUTHER: Sure.

(Whereupon the Prosecutor and Mr. Fowlkes conferring)

MR. FOWLKES: Your Honor, I thank you for this [p. 62] allotted time that you have given us. As you know, Your Honor, I have lived in Cumberland County for 12 to 14 years. And I know that your docket is pretty full. So I appreciate the time that you give me and my family, Your Honor.

You know – you know, Your Honor, me and my-wife, we – we worked on this home over four years to get into this position to – to buy this home. And unfortunately in life there's choices that we have to make. And that's what I would like my theme to be about, choices; okay?

It's mindboggling, Your Honor, that – that – that we, as – are involved in a situation like this because of choices that an individual has made towards us. Unprovoked, I might add.

And, you know, I – I just – you know, it's like my mother told me, you know, when this happened. You know, I – I pity Charles more than I scorn him. You understand what I'm saying, Your Honor? I don't have no hatred or anything towards Charles. I just – it – it – it's mindboggling that an individual like that will – will go to school for his career goals and achieve those goals in becoming a pharmacist. And to waste his time, effort, to

get up in the middle of the night and jump in that gray pickup truck and to wait (sic) – and drive down that road and wait for the traffic to go by, turn out the lights, and pull that type of firearm out of there to shoot in anyone's home is unacceptable, Your Honor, in our [p. 63] county.

You know, we – our county has had racial incidents for years, Your Honor. We had the Williams shooting with the police officer. We had all the literature that was in our public library in Vineland. Not counting the numerous cross burnings, Your Honor.

Well, what I'm asking this Court today, Your Honor – I'm asking you to – to – to make an example to let people know that if you come to Cumberland County – you can have all your – your – your hatred thoughts in your mind.

You can think anything that you want to think, Charles. But if you choose to act those – those thoughts out then there is a price to pay. And that price is your freedom. You chose to do this. We didn't. We didn't know you. Didn't want to know you. But now, unfortunately, Charles, we are entwined for life. You see what I'm saying? We're – we've – we will be together for life, because our memories, you know – you can't –

You know, to watch those kids face (sic) – my three kids come down in that foyer and to see them bullet holes, glass, sprayed all over everywhere that is an unforgettable sight, Charles. And, Charles, being that you did this, I wouldn't even wish that on you. Not even on you to put our –

You know, Your Honor, our – our – when we first moved in this house people would ride by that house and they [p. 64] would pull up in the driveway. They would say, "Oh, what a beautiful home. Mike and Mattie, how did y'all go about doing this?" 'Cause we all have something in common with that, Your Honor. We all want a piece of the American dream, you know? And that first month in that house was a – was a beautiful time, as far as mentally.

But now when people ride by, "That's the house that the pharmacist shot at. That's the house that – that – that they had all the problems that the pharmacist shot at because they were black folks;" you know?

And, Your Honor, I don't – I don't want to waste no more of your time. And I thank you very much for your – for your – for your time. But as a family but more importantly as a community, Your Honor, I had over 3-400 people come to that house. I had so many people come to the house I was tired of them coming. They was tracking up my floors and everything. I was tired of them. I mean, I appreciate it, but I was tired. You know, we ask you that you give Charles Apprendi the maximum sentence allowed by law for his heinous, terribly stupid acts that he chose to do. We ask you that you give him the maximum sentence, Your Honor.

THE COURT: All right, Mr. Fowlkes; thank you.

Anything else, Prosecutor?

MR. LUTHER: No, Your Honor.

THE COURT: All right. Mr. Apprendi, you want to [p. 65] stand up, please?

Is there anything you'd like to say on your own behalf before the Court imposes sentence?

MR. APPRENDI: Yes, just a couple things, Your Honor. First of all, I'd like to apologize to Mr. Fowlkes and his family for what I've – for what I really did. It's very – I realize that it is very wrong. And I am very sorry. I am honestly very sorry that I did this. I know I deserve to be punished for – for what I did.

But as far as the racial issue, there are so many lies and distortions and twisting of facts in this case that it would take me at least three hours to explain it to the Court. And I – I've tried to do that before. It's just not – it's just not true. My statement was not voluntary. It was – I was – I was just pounded by that detective. And then he goes on the stand and lies about it. I can't do anything about that.

As far as this black Santa on the door, I never – this – right now is the first time in the past nine months that I've ever heard of this fact about this black Santa. I didn't see any black Santa on the door.

And the door – whether I call it purple or burgundy has – it's ridiculous. It shouldn't even have been mentioned It attracted my eye. There was – the door – there was more than – not more than a 6-inch – there was more than a 6-inch [p. 66] border of purple or burgundy. The bottom of the – of the door was solid from what I can remember.

I never meant to hurt or scare anybody. I thank God that nobody was hurt. I have never tried to hurt anybody in my whole life. And my 40 years of life is my proof that

racism is not a part of my life. I've interacted with – with black people, Puerto Rican people. You know, anything, everybody. I have never had a problem.

The whole thing is – is just absurd. I – I was mislead by – by extreme pressure from the – from the detective.

And as far as admitting to scaring – to – to wanting to scare somebody when I took that plea agreement, I wouldn't answer that question that Mr. Luther presented to me because it was – it was not true. And I was under the impression that it was – how it was reworded by Mr. O'Neill, that I was not admitting to scaring anybody.

Well, you know, of course, people are going to think of the testimony. And they're going to say, "What was I thinking of? Why did I do it?" I've been asking myself this question for the past nine months, Your Honor. I wasn't thinking, period. It's not what I was thinking. I wasn't thinking. I wasn't rational. I was under the influence of alcohol and drugs.

And as far as the drugs being out of my system, which [p. 67] Mr. Luther suggested, it's just not true. one of the drugs, Ativan, has a half-life of 20 hours. I took that about 1:30 ii the morning or something like that.

I didn't – another thing is I didn't get up in the middle of the night and decide to go shoot at a house. I was at – I was at the bar. I was at the bar until like 1:30. And then the detective says I was there 'till 12 o'clock. That's not truth (sic) – it's not the truth. I didn't go home and go to sleep. I was intoxicated.

There's no other reason ever for anybody to ever, you know – I mean, like – like I'm agreeing with Mr. Fowlkes.

In this day of (sic) age somebody should be – somebody should be damned and condemned if – if the truth is that it was done for racial purposes. But this is not the truth, Your Honor.

Another thing about asking for counsel to stop the testimony. I never asked for counsel. I never had a lawyer. I didn't have – I didn't want to call my lawyer. At the time when I admitted these things, I had gone about 23 hours with no sleep. And the – the additive effects of the central nervous system depressant with alcohol – I was so – I was so exhausted. That's why I stopped the testimony. I didn't know what I was doing. I was – I was in a fog.

But the most important thing is that – that race was – had nothing to do with this case, Your Honor. None at all. And I am very – I am very sorry for what I did.

[p. 68] That's the – the most important things that I have to say.

I hope the Fowlkes maybe someday can understand. I realize that they're not going to forget me right now, but I just hope that someday maybe they can.

THE COURT: All right. Let me say this to you, Mr. Apprendi, and to Mr. Fowlkes.

The Court does not – the maximum sentence in this case is 20 years. And that's because it's an enhanced penalty that normally would have been ten years. And you're being exposed to that range of punishment as the punishment that you receive for a racially-biased crime.

And I might say that I don't have to look – I could forget about the police report. And from all the other evidence before me, the Court made a – could have made

a decision that's supported by all the other evidence that what you did was racially motivated.

If your position is that your mind was so clouded by alcohol and drugs that you didn't know what you were doing, then you should have tried your case and used that as a defense that you didn't have the requisite knowledge or purposefulness that would have satisfied the statute.

Particularly one in your situation where you have a – where you have training and education and the use of drugs. I find that to be unacceptable. The Court's not going to [p. 69] excuse one wrong, the firing at the house, by using another wrong, which is the overuse of drugs and alcohol if that, in fact, did take place.

On Indictment 00046, the 18th count –

Before I do that I might well take into consideration the aggravating and mitigating factors that have been urged by the Prosecutor and defense counsel.

With regard to the mitigating factors, let me say, first of all, that Number 4, that there were substantial grounds tending to excuse or justify the conduct of the defendant, is rejected as a applicable mitigating factor.

Likewise, Number 2, that the defendant did not contemplate that his conduct would cause or threaten serious harm, is likewise rejected. Whether he intended to hurt somebody, whether he intended to scare someone, or whether he intended to do property damage, it's inescapable that his conduct was designed to cause some type of harm. It probably caused almost the worse type of harm, which is psychological harm, to the Fowlkes.

The Court finds that Number 6, that he will compensate the victims for their financial loss, is a consideration. I'll accept the note that I received from the probation officer dated September 22nd, that she – and I read "The victim phoned and reported an uncompensated loss of $1,900 property damage and $80 in medical bills for counseling because [p. 70] of the incident."

And the Court will order restitution in that amount. If there's any argument with it by the Prosecutor or defense counsel, make an application within the next 30 days and I'll give you a restitution hearing.

The Court determines that Number 7 – particularly applicable in this case. The defendant has no history of prior delinquency or criminal activity and has led, prior to this, a law-abiding life.

Likewise, Number 8, the Court finds to be applicable that his conduct was the result of circumstances unlikely to recur, particularly in view of the fact that he's acknowledged his culpability. And he's obviously headed for incarceration.

The Court finds Number 2 and Number 9 of the aggravating factors applicable in this case.

And the Court also takes into consideration that, as I said before, I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias would not have manifested itself, except for the psychiatric problem that he has.

Presumptive sentence at the enhanced level is 15 years. The obligation of the Court is to weigh the things that I've mentioned.

And, accordingly, on the 18th count, the sentence of the Court is that you be committed to the custody of the [p. 71] Commissioner of Corrections for a period of 12 years. Under the Graves Act there's a mandatory penalty. And the Court imposes a four-year period of parole ineligibility.

The sentence on the third count is that you be committed to the custody of the Commissioner of Corrections for a period of seven years, with a period of parole ineligibility of three years.

Now, the Court's aware that all of these were independent acts. But, nevertheless, I'm satisfied that they represent an aberration. And, accordingly, the counts will all run concurrent to each other.

On the 22nd count the sentence of the Court is that you be sentenced to three years in the New Jersey State Prison And, as I said, this sentence is to run concurrent to the sentence on the other three (sic) counts – on the other two counts.

There's a hundred-dollar Violent Crime Commission penalty and a $75 Safe Street Act penalty on each of the counts.

The collection of the fines and penalties, as well as the restitution, is transferred to the prison authorities.

And if there's difficulty, Mr. O'Neill, with the type of crime and his safety in the prison, that's something that he'll have to wrestle with. And that's up to the – that's a problem of the corrections facility. I can't help that.

[p. 72] The balance of the counts, as I understand it, Prosecutor, are to be dismissed?

MR. LUTHER: Yes, Your Honor.

THE COURT: All right. The defendant –

So ordered.

– the defendant has 45 days within which to appeal this sentence. If he wishes to do and cannot afford an attorney, one will be appointed to represent him. Anything else to come before the Court on this. matter?

MR. LUTHER: No, Your Honor.

THE COURT: Mr. O'Neill?

MR. O'NEILL: Judge, one other thing. D-1 should be admitted into evidence. Introduce that. That's the –

THE COURT: Fine. We'll make it part of the record; all right?

(Whereupon the hearing concluded at this time)

CERTIFICATION

I, CAROL H. VENDZULES, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Superior Court on September 29, 1995, Tape No. 17189(1), Index No. from 1672 to 7349, Tape No. 17189(2), Index No. from 0000 to 1581, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-

compressed transcript of the proceedings according to the best of my ability and knowledge.

Signature /s/ Carol H. Vendzules
CAROL H. VENDZULES
CERTIFIED DIRECTOR/
TRANSCRIBER OF THE
STATE OF NEW JERSEY,
AOC #268
THE TYPE-RIGHT-ER

DATED: 1-9-96

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CUMBERLAND COUNTY
IND NO. 95-01-46
A.D. #A-1587-95-T4

STATE OF NEW JERSEY, Plaintiff, vs. CHARLES APPRENDI, JUNIOR, Defendant.	)	TRANSCRIPT OF PLENARY HEARING

Place: Cumberland County
Courthouse
Broad and Fayette Streets
Bridgeton, New Jersey

Date: September 5, 1995

BEFORE:

THE HONORABLE RUSHTON H. RIDGWAY, J.S.C.

TRANSCRIPT ORDERED BY:

JOSEPH D. O'NEILL, ESQ.

APPEARANCES:

ROBERT J. LUTHER, First Assistant Prosecutor
Attorney on behalf of the State of New Jersey

JOSEPH D. O'NEILL, Esq.
Attorney on behalf of the Defendant

THE TYPE-RIGHT-ER
Carol H. Vendzules
Certified Agency Director/
Transcriber, AOC #268
State of New Jersey
(609) 881-2422

Sound-Recorded Proceeding
Recording Operator, Robin DeFrancisco

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[p. 3] THE COURT: Just so we get this in the proper context, the State has moved for an extended term because it's a racially – they claim it's a racially-biased crime.

Am I correct in that?

MR. LUTHER: That is correct, Your Honor.

THE COURT: That motion's returnable on the date of sentencing, which is September the 15th.

You argue, Number One, that the statute is unconstitutional. And you both filed briefs on that issue. And, as I understand from our conversation in chambers, if I should find that the statute is unconstitutional, of course, that obviates the extended-term issue.

MR. O'NEILL: Exactly, Your Honor.

THE COURT: All right. But since witnesses are here on the extended-term issue, which are normally heard on the date of sentencing – but since they're here today and you're not going to add, as I understand it, any oral argument to the constitutionality issue, you're going to rely on the papers that you filed, I'll reserve decision on that.

MR. O'NEILL: I intend to, Judge, yes, sir.

THE COURT: And that's all true –

MR. O'NEILL: Yes, sir.

THE COURT: – so far?

All right. Now, the Prosecutor is going to come and we're going to treat this is [sic] a motion for a return on it today, [p. 4] rather than the date of sentencing.

True, Mr. Luther?

MR. LUTHER: Yes, Your Honor,

THE COURT: (Indiscernible – voice too low).

MR. LUTHER: – with respect to Dennis D'Augostine. I have the victims of the crime. I want to have them testify, as well. They're not here today. They intend to be here on the 15th. I'd like to have them testify briefly on the 15th at the date of sentencing.

THE COURT: What would they add to that issue?

MR. LUTHER: That they were the only – to their knowledge the only black family in that neighborhood at the time of the crimes.

THE COURT: You can't stipulate to that. We indicated that in chambers.

MR. O'NEILL: Only because it's not true. Now, it may be true as far as Ms. Fowlkes –

THE COURT: Well, I wouldn't –

MR. O'NEILL: – is concerned.

THE COURT: – want you to stipulate to something which is not true.

MR. O'NEILL: I'm sure you wouldn't, Judge. You know I wouldn't anyway; don't you?

THE COURT: I don't think you would.

But, in any event, –

[p. 5] MR. O'NEILL: Judge, –

THE COURT: – in any event, we'll get testimony on that. But there are other stipulations that can be entered into.

And then the Prosecutor will rest, subject to the testimony of –

What's the name, Fowlkes?

MR. LUTHER: Yes, Mattie and her husband, the Fowlkes.

THE COURT: Subject to that.

And then you can proceed with the witnesses that you have today.

MR. O'NEILL: Yes, Judge. If I may, two things.

Number One, the record should reflect that the defendant is present, but he is not wearing the suit that was carried to the jail for him to wear today. There's no jury here, so I know Your Honor will not –

THE COURT: Don't worry about it.

MR. O'NEILL: Thank you, Judge.

Number Two, Judge, the investigation developed Saturday that there was another black family who lived in that neighborhood on that street named Lake, who may have moved before the Fowlkes moved in. But there is a Vineland State School house on that street. There are three –

THE COURT: Well, where do the Fowlkes live? Or [p. 6] where did they live when this took place?

MR. O'NEILL: East Chestnut Avenue, Judge, in Vineland.

THE COURT: And –

MR. O'NEILL: 5211 East Chestnut. It's approximately –

THE COURT: Is that east of Lincoln Avenue?

MR. APPRENDI: West of Lincoln Avenue.

MR. LUTHER: Judge, it's approximately a hundred yards from the Atlantic County border. It is right at the edge.

THE COURT: Then that must east of Lincoln Avenue.

MR. APPRENDI: It's east. It's east.

THE COURT: It's east of Lincoln Avenue.

MR. O'NEILL: I think the Court's right, yeah.

There is a home – there are three homes together. One is the Fowlkes home. There is another home owned by an Italian family, Pinotti or something to that effect. And then there is a third home owned by the Vineland State School, at which location certain mentally retarded people live. And there are workers employed by the State there, some of whom are black and frequent the area. There either are black residents there or certainly black employees.

One of the employees is Ms. Fowlkes; okay? So with that in mind we can probably effectuate a stipulation, like Mr. [p. 7] Luther suggested, that perhaps the only residential people there were the Fowlkes family, who were African-Americans. But there were these other black people that I can prove were there. Ms. Fowlkes being one of them.

THE COURT: Well, I don't know if Mr. Luther is prepared to stipulate anything on that issue today; are you?

MR. LUTHER: If Mr. O'Neill would stipulate that the Fowlkes family was the only African-American residential family in the neighborhood of Mr. Apprendi who resided at 4745 East Chestnut, which was about, I think, seven-tenths of a mile down the road – if he's

prepared to stipulate that they were the only black residential family in the neighborhood of Mr. Apprendi, the State would accept that stipulation.

MR. O'NEILL: Well, what about my stipulation to the effect that the Lake family, a black family, lived there for many years? They may or may not have been living there at the time that Ms. Fowlkes moved in, which I think was July of 1994. Also, if the State would stipulate the provable fact that the Vineland State School does have a house there at which black people are –

MR. LUTHER: Judge, certainly I'd stipulate about the Vineland State School. And Mr. O'Neill just indicated on the record that he found out on Saturday about the Lake family, which I'm completely unaware of. So the sentencing –

THE COURT: I don't think that Mr. –

[p. 8] MR. LUTHER: But sentencing is the 15th.

THE COURT: – Luther's in a position to enter into the stipulation that you're suggesting today. So why can't we put that issue aside until the Fowlkes are here and you know that that issue's going to come up?

MR. O'NEILL: Sure.

THE COURT: You know what they're going to testify to. And you'll be prepared to meet it with whatever evidence that you have on the date of sentencing. I'm not going to accept your – quite frankly, and I say this respectfully, I'm not going to accept a stipulation from you that others were living in the area or that – the name of some other institution had people living in the area who were African-Americans. I mean, you have to bring

in some proof that its cogent before the Court; fair enough?

MR. O'NEILL: Sure.

THE COURT: All right; fine.

Now, but what we can stipulate to, as I understand it, is that the State through the police department took a statement from the defendant that the statement was – that he was properly *Mirandized* and that he voluntarily and knowingly gave this statement. And then in the statement he made certain representations as to the reason why he shot at the house.

Now, is that all – can we stipulate to that, Prosecuto [sic]

MR. LUTHER: That the *Miranda* was complied with, yes, [p. 9] Your Honor.

THE COURT: I mean, not only complied with, but that he gave a statement.

MR. LUTHER: Yes.

THE COURT: That the statement contained a portion thereof indicating that he had shot at the house because he knew that blacks were living there. Isn't that what the statement says?

MR. LUTHER: Yes, Judge.

THE COURT: All right. Then can we stipulate to all that?

MR. O'NEILL: Yes.

THE COURT: Okay; fine.

MR. O'NEILL: But with the admonition, if I may, that the position of the defense is that because of

Mr. Apprendi's physiological mindset because he had imbibed in drugs and alcohol because of the synergistic effect of these, that what he told the police was not true because he was misled into agreeing with what the police suggested to him. Namely, that the shooting was a racial bias (sic) act – a racially-biased act.

THE COURT: But he doesn't have to present the police officer or officers who took the statement to support his position. And you don't need that to cross-examine him, as I understand it.

[p. 10] MR. O'NEILL: No –

THE COURT: You're –

MR. O'NEILL: – not at all.

THE COURT: – going to present extra testimony to make sure, in a sense, that it's not connected with the police investigation. And it's namely a psychologist and some lay witnesses who are going to testify in this issue. Am I understanding it correctly?

MR. O'NEILL: Exactly, Judge.

THE COURT: Okay.

MR. LUTHER: Judge, with respect to the statement to Detective D'Augostine, Detective D'Augostine is in the courtroom today. It's my understanding there's a stipulation that *Miranda* was complied with. I would like to call him just to briefly inform the Court about the contents of the statement.

THE COURT: Isn't the statement memorialized? Did he sign off on it?

MR. LUTHER: No, it was not a taped statement. It was an oral statement to Detective D'Augostine.

MR. O'NEILL: Well, the Court has stated the stipulation that I would agree to. I see no reason to call the detective. If you want to sit here and listen to him, we all know what he's going to say. I'm not going to attack him.

THE COURT: Where is the detective?

[p. 11] MR. O'NEILL: He's in the back of the courtroom, Judge.

In other words, if there is anything missing from the stipulation proposed by the Court, Mr. Prosecutor, why don't you tell us and see if we can cure that –

THE COURT: No, he –

MR. O'NEILL: – to avoid the testimony?

MR. LUTHER: Judge, –

THE COURT: I assume that what Mr. Apprendi told Detective D'Augostine is in the police reports; true?

MR. LUTHER: Yes, Your Honor.

THE COURT: But it wasn't memorialized in any written statement or a taped statement.

MR. LUTHER: Correct.

THE COURT: Okay.

MR. O'NEILL: Judge, let him testify. I'll –

THE COURT: Raise your right hand. Stay right there. DET/SGT. DENNIS D'AUGOSTINE, WITNESS, SWORN DIRECT EXAMINATION BY THE COURT:

Q. Okay. And you know we're talking about an occasion when you talked to Mr. Apprendi?

A. Yes, sir.

Q. And you questioned him as to the reasons why – or reason why he fired a shot or shots at the Fowlkes home?

A. Yes, sir.

D. D'Augostine – Direct

[p. 12] Q. All right. What did he say?

A. He told me that he fired shots at the home because there were black – black people living there. And that he had seen them. And then I asked him how he knew the black family lived at this certain residence. And he told me he seen – seen one of them outside. And he stated that he shot at – on two different incidents.

During the interview I asked him if he was under the influence of drugs or alcohol.

Q. No. No. No. No, I don't want to go into that –

A. Okay.

Q. – at this point.

But it's stipulated the *Miranda* warnings were properly given and –

A. Yes, sir.

Q. – (indiscernible – voice too low)

A. I advised him of his –

Q. I just want to know what he said. And as to the report, I'll ask him –

A. Yeah.

Q. – (indiscernible – voice too low) taped statement (indiscernible – voice too low) statement.

Is there anything else you want to ask, Mr. Luther?

MR. LUTHER: Yeah, just the details about the incident itself, including the questions about drugs and [p. 13] alcohol, since certainly the defense psychiatrist (sic) – or psychologist is going to get into that. It is important that I call the detective just to ask him about that. It shouldn't be long.

THE COURT: You should save him for rebuttal witness.

MR. LUTHER: Well, he's –

THE COURT: Because I don't think that the psychiatrist's (sic) – or psychologist's testimony is going to be related to his (indiscernible – voice too low) or not. (Indiscernible – voice too low).

MR. LUTHER: Judge, if the Court wants – if the Court is treating today as the return date as the – for the motion of extended term on a racial bias, I just want to have the detective tell the Court what Mr. Apprendi told him on December 22, 1994.

THE COURT: He told me. He just told me what he said; that he fired at the house on two occasions because there were black people in it.

Is that right, Mr. D'Augostine?

THE WITNESS: Yes, sir.

THE COURT: Anything else you want to ask him on that issue, Mr. Luther?

MR. LUTHER: Sure.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Did Mr. Apprendi state whether or not he knew the [p. 14] victims at the house that he fired at?

A. No, he did not know the victims.

Q. Did he say why he fired the shots at them then?

A. He stated he knew there were black –

MR. O'NEILL: Asked and answered. The Judge asked him that.

THE COURT: That's all right.

Go ahead.

THE WITNESS: He stated that he knew that there were black people who lived at that residence because he's seen them out in the yard. And he was giving them a message that they were in his neighborhood.

THE COURT: Now, you're reading from your police report?

THE WITNESS: Yes, sir.

THE COURT: Was that taken from notes made by you at the time?

THE WITNESS: Yes.

THE COURT: And do you need that to refresh your recollection today?

THE WITNESS: Yes, I do, Your Honor.

THE COURT: What else, Mr. Luther?

DIRECT EXAMINATION BY MR. LUTHER:

Q. Did he ever indicate that because the Fowlkes were black in color, Mr. Apprendi did not want them in the [p. 15] neighborhood?

A. That's correct.

MR. O'NEILL: Asked and answered, Judge, the third time.

THE COURT: All right.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Yes?

A. Yes, sir.

MR. LUTHER: Judge, that's all I have on the limited issue of racial bias. Certainly, there were other things Mr. Apprendi said, but if the Courts want me to call the detective in rebuttal, I will.

THE COURT: If you need him.

MR. LUTHER: I will.

THE COURT: Let's see what the psychologist's –

MR. LUTHER: Okay.

THE COURT: – testimony is.

Any questions you want to ask the officer?

MR. O'NEILL: Yes, Judge, if I may.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Sergeant, police reports of November 14 of 1994 indicate that Mattie Fowlkes stated her opinion that previous shootings at her house were racially motivated; isn't that true?

MR. LUTHER: Objection; way beyond the scope of

D. D'Augostine – Cross

[p. 16] direct.

THE COURT: Sustained.

MR. O'NEILL: May I be heard on that issue, Judge?

THE COURT: I sustained the objection. Let's move on.

MR. O'NEILL: Very well.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. There was another incident in the same neighborhood on October 24 of 1994 involving the Bergamo family; isn't that right?

MR. LUTHER: Objection; way beyond the scope of direct. And I've never even heard of this allegation until right now.

MR. O'NEILL: It's in the reports.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Wasn't there an arson at the Bergamo premises on October 24 of '94?

MR. LUTHER: Judge, the Court just sustained my objection –

MR. O'NEILL: It's in –

MR. LUTHER: – on that very question.

MR. O'NEILL: – the police reports, Judge.

THE COURT: There are a lot of things that are in –

Listen, Mr. O'Neill. You suggested that we could [p. 17] shorten this up by putting certain stipulations on the record. And I agreed to do that. Do you want a full-blown hearing and have the detective take the witness stand and we'll go through the whole statement including perhaps, parts of the police report, and then you can cross-examine him at length. But the officer was placed under oath merely to verbalize what's in the police reports. Namely, what the defendant told to the police were the reasons – the reasons why he fired at the house. Now, if you want to go beyond that, I'll permit you to do it. But we're going to have a full-blown hearing.

MR. O'NEILL: Well, Judge, I don't need to do that. I was the one who agreed to the stipulation. My worthy adversary said he wanted to ask him some questions. I wasn't going to ask him anything.

THE COURT: The stipulation is that Mr. Apprendi told the police officers – words to the effect he fired at the house because the occupants were black. And he knew that they were black. And I think that substantially says what Mr. Apprendi told the police department.

Now, if you want to go beyond that –

MR. O'NEILL: No, that's what I agreed to stipulate, Judge.

THE COURT: All right; fine. So there we are. Now, what else do you want to ask this officer along these same lines?

[p. 18] MR. O'NEILL: No questions at this time, Judge.

THE COURT: Anything else, Mr. Luther?

MR. LUTHER: No, Your Honor.

THE COURT: Have a seat, Detective.

Now, as I understand it from our conversation in chambers, there were certain other stipulations which were put on the record which, in effect, the Prosecutor's going to argue, since he maintains the position that it was a racially-biased crime.

Am I right, Mr. Luther?

THE COURT: (No verbal response).

MR. LUTHER: Yes, Your Honor.

THE COURT: What are the other stipulations?

MR. O'NEILL: Judge, may I interject here for a second?

THE COURT: Sure.

MR. O'NEILL: I respectfully move that Detective/Sergeant D'Augostine leave the courtroom under *State versus Duff*. And I'm going to ask that the witnesses be sequestered.

MR. LUTHER: I have no objection, Your Honor.

THE COURT: All right. We're going to have to tell the witnesses. We have the witnesses here. Do you want all the witnesses?

MR. O'NEILL: I don't know if Mr. Luther's going to [p. 19] call any others, Judge. I just didn't want the sergeant here to hear our argument before the Court

on the law. It might effect his later testimony if he is recalled.

THE COURT: What are the other stipulations?

MR. LUTHER: Judge, the stipulations, I believe – I think that was all the stipulations that we agreed to, frankly, in chambers.

Am I correct?

MR. O'NEILL: (No verbal response).

THE COURT: Mr. O'Neill?

MR. O'NEILL: The defense calls Miller Taylor to the stand.

THE COURT: Mr. Taylor, place your left hand on the Bible and raise your right hand.

MILLER TAYLOR, WITNESS, SWORN

THE COURT: And your name is?

THE WITNESS: Miller Taylor.

THE COURT: Millard (sic) Taylor?

THE WITNESS: No, Miller.

THE COURT: Miller Taylor.

THE WITNESS: Right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Taylor, would you tell His Honor by whom you are employed?

A. I'm employed by the State of New Jersey for Ancora State

[p. 20] Hospital.

Q. Do you know the defendant, Charles Apprendi, Junior?

A. Yes, I do.

Q. How do you know him, sir?

A. Bowling. Plus, he was my pharmacist.

THE COURT: I didn't catch the first part.

THE WITNESS: Bowling.

THE COURT: Bowling.

THE WITNESS: Yes.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. You were in a bowling league –

A. Yes.

Q. – with the defendant?

A. Yes.

Q. In that regard, did you have occasion to socialize with him and with other white and black people?

A. Yes.

Q. Okay. Like after bowling would you like –

A. After bowling we would go out and have a few.

Q. Okay. Now, you say you know other people who know the defendant?

A. Yes.

Q. Many people?

A. Many people, yes.

Q. All right. Do you know if he has a reputation for [p. 21] being racially biased against African-Americans?

A. Not that I know of.

Q. You've never heard anything to that effect?

A. No.

Q. He's never indicated to you anything to that effect?

A. No.

MR. O'NEILL: Cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, has Mr. Apprendi ever had you over at his home?

A. No.

MR. LUTHER: No further questions, Judge.

MR. O'NEILL: One further question.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Can you give us a ballpark figure as to how many times you have socialized with him, a ballpark, over the years?

A. Over the years, oh, maybe about 50 times.

MR. O'NEILL: No further questions.

THE COURT: Anything else?

MR. LUTHER: No, Judge.

THE COURT: All right. Well, we can put on the record – but I guess it would be fair to put on the record that Mr. Taylor's Afro – African-American.

MR. O'NEILL: Yes, sir; thank you.

THE COURT: If somebody reads this record later on they'll understand that – his testimony.

[p. 22] MR. O'NEILL: Thank you, sir.

Thank you, Mr. Taylor.

THE COURT: Thank you, Mr. Taylor.

THE WITNESS: You're welcome.

MR. LUTHER: I'm sorry. If I could just have one other question.

RECROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, what was your address?

A. 151 Axtell Avenue.

Q. And what city is that in?

A. Vineland.

Q. Vineland; okay. Thank you.

MR. O'NEILL: Thank you, Mr. Taylor.

THE WITNESS: You're welcome.

MR. O'NEILL: The defense calls Mark Wolfson to the stand.

THE COURT: M-A-R-K.

THE WITNESS: Wolfson. And it's W-O-L-F-S-O-N.

THE COURT: All right. Place your left hand on the Bible and raise your right hand.

MARK WOLFSON, WITNESS, SWORN

THE COURT: Be seated.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Will you tell us by whom you are employed, Mr. Wolfson?

M. Wolfson – Direct

[p. 23] A. Pfizer Pharmaceuticals.

Q. Do you know the defendant?

A. Yes, I do.

Q. Do you know other people that know the defendant?

A. Yeah, I know a lot of people.

I've known Charlie for 20 years.

Q. All right. How do you know Charlie Apprendi, Mr. Wolfson?

A. We went to college together. We lived together and we've worked together and we've traveled together.

Q. Would you characterize yourself as his best friend?

A. Yeah, for a long time.

Q. Okay. Now, you say you know many other people who know the defendant. Have you ever been in his company where remarks of a racial (sic) – racially-biased attitude toward African-Americans have been made?

A. None. The only reputation Charlie ever had was being a little crazy.

Q. Being a little crazy?

A. Yeah, his nickname in college was Nut-Nut.

Q. Okay. Do you know if he has a reputation for being racially biased against Afro-Americans?

A. No.

Q. He does not?

A. No.

[p. 24] MR. O'NEILL: You may cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, it's rather obvious, but for purposes of the record you're a white male?

A. Yes.

Q. Okay. And you knew Mr. Apprendi in college?

A. Yes.

Q. And Mr. Apprendi, in fact, graduated college, is that correct?

A. Yes.

Q. And that was Rutgers University?

A. Yeah.

Q. And it was, in fact, a five-year program in pharmacy; correct?

A. Right.

Q. And he successfully graduated?

A. Yes.

MR. LUTHER: Nothing further.

MR. O'NEILL: You may step down. Thank you for coming, Mr. Wolfson.

The defense calls Joseph Romano to the stand.

THE COURT: Place your left hand on the Bible and raise your right hand.

JOSEPH ROMANO, WITNESS, SWORN

THE COURT: Have a seat.

J. Romano – Direct

[p. 25] DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Romano, by whom are you employed, sir?

A. By the City of Vineland.

Q. In what capacity?

A. Mayor.

Q. Do you know the defendant, Charles Apprendi, Junior?

A. I knew him all his life.

Q. Do you know other people who know the defendant?

A. Quite a few, yes.

Q. Have you socialized with the defendant in the company of blacks?

A. Yes.

Q. On some occasion, a few occasions, many occasions, what?

A. On a number of occasions.

Q. All right.

THE COURT: And the question was has he socialized with the defendant in the company of blacks?

MR. O'NEILL: Yes, sir.

THE COURT: Okay.

MR. O'NEILL: All right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Have you ever come to any knowledge that he has any racial bias against African-Americans?

A. Not to my knowledge.

[p. 26] Q. Do you know if he has a reputation among other people for being racially biased against Afro-Americans?

A. I don't think so.

MR. O'NEILL: You may cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Again, Mayor Romano, it's obvious you are a white male.

A. Right.

Q. Okay. Sir, isn't it true that you're friendly with the defendant?

A. Yes.

Q. And you have been so for his whole life; correct?

A. Right.

Q. Okay. Have you ever been over at the defendant's home?

A. Yes.

Q. Okay.

MR. LUTHER: No further questions, Judge.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Have you ever been at the family home in the company of blacks, like Mel Scott?

A. Yes.

Q. All right.

MR. O'NEILL: No further questions.

THE COURT: Anything else, Mr. Luther?

J. Romano – Cross

[p. 27] MR. LUTHER: No, Judge.

THE COURT: Very well; you may step down.

MR. O'NEILL: The defense calls Charles VanFleet to the stand.

THE COURT: Put your left hand on the Bible and raise your right hand, please.

CHARLES VANFLEET, WITNESS, SWORN

THE COURT: All right, Mr. O'Neill.

MR. O'NEILL: Thank you, sir.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. VanFleet, by whom are you employed, sir?

A. Winslow's Pharmacy, Vineland.

Q. In what capacity?

A. Pharmacist in charge.

Q. Do you know the defendant, Charles Apprendi, Junior?

A. Yes, I do.

Q. How do you know him?

A. He interned under me in the pharmacy when he graduated from pharmacy college.

Q. For approximately how long have you known him?

A. About 16 years.

Q. Have you ever seen him interact with African-Americans?

A. Yes, I have.

Q. How has that occurred, sir?

C. VanFleet – Direct

[p. 28] A. In the store and upon our visiting restaurants, Charlie and I.

Q. And you've seen –

A. I used to take him on weekends up to Lancaster for eating in a particular restaurant that I like. And he enjoyed it. And there were a lot of black people there.

Q. Have you employed African-Americans at the drugstore?

A. Yes, we have.

Q. At the same time that Charlie Apprendi worked for you?

A. Yes.

Q. Have you seen him interact with black people?

A. Yes, I have.

Q. Have you ever known him to act or say anything in a racially-prejudiced tone or words?

A. No, I have not.

Q. Do you know if he has a reputation for being a racist?

A. No.

MR. O'NEILL: Cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. So you knew Mr. Apprendi through your work at the pharmacy; correct?

A. Yes.

Q. And how long did Mr. Apprendi work at the pharmacy

[p. 29] with you?

A. In total I would say three or four years –

Q. Okay.

A. – over a period of time. He left the store and came back. He managed one of our other stores and then came back to us.

Q. And isn't it true that he had trouble dealing with the general public at the store?

A. Not to my knowledge.

Q. Isn't it true that at first he was dealing with the general public and then later on he was moved to the back where he really didn't have contact with the general public?

A. No, he managed our store on Main Road. And when that store closed he come over to work for us in the nursing home section downstairs.

Q. True. So he worked in the –

A. That's where he worked. And he also worked upstairs.

Q. Okay.

A. Like at night when I was off or he would cover my supper.

Q. Was he dealing with members of the general public on a regular basis?

A. Off and on. It depended on his schedule.

Q. Isn't it true that later he was really not dealing with the general public much? Rather, he was just filling prescriptions for the nursing home?

[p. 30] A. That was his main job; –

Q. Right.

A. – right; uh-huh.

Q. So his main job in filling prescriptions with the nursing home would not really bring him in contact with members of the general public; is that correct?

A. Not the general public when he was downstairs, no.

Q. Right.

A. But we had other pharmacists doing the same thing downstairs.

Q. Okay. And that earlier in his employment he had more contact with members of the general public; is that true?

A. Yes, he did; uh-huh. Until that store closed.

Q. Okay. And it's true you're friendly with the defendant, sir?

A. Yes.

Q. And although it's obvious, I'll have to ask you for the record: You're a white male?

A. Right.

Q. Okay.

MR. LUTHER: Nothing further, Judge.

MR. O'NEILL: One last one, Judge, if I may.

THE COURT: Uh-huh.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Did Charlie Apprendi regularly interact with other

[p. 31] black employees of yours at the stores?

A. Yes.

MR. O'NEILL: No further questions.

THE COURT: All right. You may step down.

THE WITNESS: Okay.

MR. O'NEILL: The defense calls Gary Castellini.

THE COURT: Place your left hand on the Bible and raise your right hand.

GARY CASTELLINI, WITNESS, SWORN

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Castellini, by whom are you employed?

A. Self-employed.

Q. What do you do, sir?

A. Okay. I – well, actually a co-owner of a farm.

Q. Okay.

THE COURT: A co-owner of a farm, you said?

THE WITNESS: Yes.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Do you know the defendant, Charles Apprendi, Junior?

A. Yes, I do.

Q. How do you know him, sir?

A. Well, I've been friends with him for – it's over 20 years. And, well, we've bowled together, softball, golfed together.

Q. Do you know other people who know him?

G. Castellini – Direct

[p. 32] A. Yes, I do.

Q. Have you ever interacted with him with African-Americans?

A. Yes, as a matter of fact, he had – well, Miller testified. And Miller was on our bowling league. And we also had a bowler that we were on – Charlie and I were on the same bowling team with a fellow by the name of Olin. And he was a – you know, an Afro-American. And –

Q. Is that Olin Gould, –

A. Yes.

Q. –the auto body owner?

A. Yes.

Q. Okay. Have you ever known him to utter any racially-biased remarks against African-Americans?

A. None that I can say of.

Q. Do you know if he has a reputation for being racially-biased against blacks?

A. No. If anything, I've seen just the opposite.

MR. O'NEILL: Cross-examine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, for the purposes of the record you're a white male?

A. Yes.

Q. And it's true that you're friendly with the defendant?

G. Castellini – Cross

[p. 33] A. Yes.

Q. And you've been friendly with him for how long?

A. It's a little over 20 years.

Q. All right.

MR. LUTHER: Nothing further, Judge.

MR. O'NEILL: One last question.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Were you ever at the defendant's house with blacks?

A. Yes. Well, a couple instances I can give you. Charlie would have – as a matter of fact, I think it was Labor Day barbecues and also Super Bowl parties. And –

Q. With black social guests?

A. Yes

MR. O'NEILL: No further questions.

THE COURT: All right. You may step down.

MR. O'NEILL: Judge Pagliughi.

THE COURT: (Indiscernible – voice too low).

JUDGE PAGLIUGHI: Fine, Judge, and yourself?

MARTIN PAGLIUGHI, WITNESS, SWORN

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Sir, you are retired as judge of the Vineland Municipal Court?

A. That is correct.

Q. Do you know the defendant?

A. Yes.

[p. 34] Q. For approximately how long have you known him, Judge?

A. I'd say since he's been born.

Q. Okay. Do you know other people who know him?

A. Oh, I can say quite a few.

Q. Have you ever heard him or heard of his making racially-biased remarks against blacks?

A. Never have I heard that.

Q. Do you know if he has a reputation for being racially-biased against African-Americans?

A. I would say – I would say no, based on the –

May I add something?

Q. Yes, sir.

A. Before he moved into his present home on the corner of Chestnut and Lincoln, the second house away from his mother and father's house, there were (sic) a black family that lived in that house. But I don't know how many years. And I have on occasions I'd seen him over there fixing a tire or helping them get their car started. So this is what I base my opinion on, that he's not prejudiced.

Q. Thank you, sir.

You may cross-examine him.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, for purposes of the record you're a white male?

A. And Italian, too.

Q. Okay. And, sir, it's true you're friendly with the

[p. 35] defendant for a long time?

A. Well, you have to understand. We lived across the street from them. And when he was born and my children were born – and they grew up together.

Q. Okay. So you've known him basically his whole life?

A. Oh, yes.

Q. Okay. And it's fair to say you're friendly with him?

A. Well, I haven't seen him probably in the last four or five years because we moved out a long – but –

Q. Because he moved?

A. He moved out of town.

Q. It's true he no longer lives – at least in 1994 he no longer lived with his parents; is that correct?

A. Yeah. Well, we were still living in our house, I think, when he moved. Well, when we sold that's when he moved, 'cause he wanted to buy our house.

THE COURT: You sold your house and moved out of town how long ago?

THE WITNESS: Six, seven years ago.

THE COURT: And would it be fair – six or seven years ago. Would it be fair to say that during that last six or seven years your contact with him was not as close as it was before then?

THE WITNESS: Well, that's true.

MR. LUTHER: Nothing further, Judge.

[p. 36] THE WITNESS: But I did have contact with people, you know, that I knew. They all knew Chas. They never expressed any views that he was racial.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Then during the time that you were out of town, out of Vineland, you had contact with other people who did have contact with the defendant?

A. Oh, sure. Sure. My children grew up together.

Q. Then you know of no reputation that he has for being racially biased against blacks?

A. None whatsoever.

Q. Thank you, sir.

MR. O'NEILL: No further questions.

THE COURT: All right.

MR. O'NEILL: The defense calls Charles Apprendi, Senior, to the stand.

THE COURT: Put your left hand on the Bible and raise your right hand.

CHARLES APPRENDI, SENIOR, WITNESS, SWORN

THE COURT: All right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Now, Mr. Apprendi, you are the father of the defendant?

A. Yes.

Q. Okay. Chas, your son, lived with you and your wife

[p. 37] until how long ago approximately?

A. I'd say he moved approximately five or six years ago.

Q. Okay. Now, during that interim time between the time when he moved and December 22 of 1994, did you see him regularly or not?

A. Oh, yes, he came to our house, for dinner almost every night.

Q. Did you have occasion to have at the family home African-Americans?

A. Yeah. Oh, sure, we had frequent visits. My wife was a teacher and she taught with a lot of African-American teachers.

Q. And did you see your son interact with the black people?

A. Yes, when he was at our house he would interact very nicely with them.

Q. Your son is what, 40 years old?

A. 40, yes.

Q. During his 40 years have you ever come upon any occasion until this arrest on December 22 of 1994 when there was any indication to you at all that he was racially biased against black people?

A. No, never. There's never been any indication. He had Afro-American people at our house. Mel Scott was one. He used to stop by to see us, him and his wife. He

would stop by quite a bit. And I know he was on the bowling team with Olin, the [p. 38] Bowling Booms (phonetic). And they got along fine, as far as I know.

Q. And to your knowledge he has no reputation for being racially biased against blacks?

A. None at all.

MR. O'NEILL: You may take the witness.

MR. LUTHER: No questions, Judge.

THE COURT: All right. You may step down.

MR. O'NEILL: If Your Honor pleases, there are two affidavits in the court file. The Prosecutor has –

Do you have those affidavits from Gould and –

MR. LUTHER: I was out all last week.

MR. O'NEILL: Oh, well, let me show it to him. Fine, that's one.

If Your Honor pleases, the affidavits to which I refer are those of Olin Gould and Mel Scott. I would ask the Court to take judicial notice that both of those gentlemen are African-Americans, so they are part of the court record, as well.

With that the defense rests, Judge.

Except for one witness. And that is our expert witness.

THE COURT: All right. You want to call him, please?

MR. O'NEILL: Dr. Cooke.

Your Honor, while the doctor's approaching the [p. 39] witness stand, I presented to the Court and to Mr. Luther copies of Dr. Cooke's very lengthy CV. Rather than taking the Court's time to go through his CV, I would ask the Court accept that CV as an exhibit. And I will just ask him a couple of preliminary questions. May I do that, Judge?

THE COURT: Mr. Luther?

MR. LUTHER: No objection.

THE COURT: All right.

MR. O'NEILL: Thank you.

THE COURT: Any objection to his being accepted as an expert in the field of psychology?

MR. LUTHER: No, Judge.

THE COURT: Is it clinical psychology?

THE WITNESS: Clinical psychology and forensic psychology.

THE COURT: All right, Mr. Luther?

MR. LUTHER: That's fine, Judge.

THE COURT: All right.

GERALD COOKE, M.D., WITNESS, SWORN

THE COURT: Your full name is?

THE WITNESS: Gerald Cooke – C-O-O-K-E.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Doctor, at my request did you have occasion to examine the defendant in the Cumberland County Jail back on February 15 of 1995?

[p. 40] A. Yes.

Q. Now, Doctor, what was the purpose of the evaluation as you understood it to be?

A. Well, the primary purpose initially is to understand the psychological functioning and then apply that to an understanding of his reasons for committing the offense. And also to address issues of whether he is the kind of individual who could be easily coerced or influenced during an interrogation to make statements that were not accurate statements.

Q. Doctor, prior to your examination of the defendant and your taking a history and formulating a clinical opinion, did I provide to you various records, such as the Vineland Police Department reports and the indictment and medical notes from the Cumberland County Jail, and also a ballistics reports from the State Police? Did you examine all of those?

A. Yes, you did. And I did review those.

Q. All right. Doctor, did you have occasion to administer any objecting testing to this defendant?

A. Yes.

Q. What tests did you administer? And explain briefly, Doctor, what each of them is.

A. Okay. The first, Your Honor, was the Minnesota Multiphasic Personality Inventory 2, known as the MMPI2. This is the most widely used objective personality test. It's [p. 41] particularly valuable in forensic cases because it has three validity scales that tell us whether the individual is approaching the testing in a candid manner or exaggerating problems that aren't there or denying problems that are there. So it's valuable for that.

It then has a series of clinical scales that provides information on the individual's symptoms, problems, personality dynamics, things of that nature.

I also gave him an incomplete sentences blank. That's a projective personality test. And that is used to get information about conscious attitudes and values, the perception and quality of interpersonal relationships, perceptions of himself, things of that nature.

I gave him the raw shock inkblot technique. That is a series of inkblots. It's also a projective personality test. It's designed to push a little deeper into what some people might call the unconscious. It also reveals underlying conflicts, fears, wishes. And also tells us how accurately the individual perceives reality. And if there are distortions or interferences with perception, what some of the psychological reasons for that might be.

I then also gave him three sub-tests of the Wechsler Adult Intelligence Scale, Revised. And the purpose of that was not only to get a rough estimate of intellectual

functioning – I didn't give the whole test, so what I have is just an estimate. [p. 42] But also to see if there's any interference with intellectual functioning due to emotional or psychological factors.

Q. Doctor, upon arriving at the interview with the defendant, how did he appear to you?

A. Well, both during the interview and during my testing I found him to be anxious. He had what I might call a good deal of nervous energy. But it also went to the extent in terms of his speech. The speed of his speech, his affect or emotional tone, I would describe as hypomanic. And that is that – fast, somewhat pressured kind of speech that's often associated with an affective or emotional tone disorder.

Part of the result of that was that his attention and concentration was not good. He listened very poorly to my questions. And I had to repeat my test instructions or get him to stop and listen. I had to specifically focus him so he would listen to instructions, rather than jumping right into things.

He was self-critical about his responses and performance to the tests. And I also found in giving – in doing the interview portion that he had what I would call obsessive-compulsive traits. And I'll get into that more because those also appeared on both the objective and projective personality testing.

I did not find that he was psychotic. I did not find that he had any schizophrenia or thinking disorder or anything of [p. 43] that nature.

Q. So this defendant is not insane and cannot invoke any kind of an insanity defense or a mitigating circumstances defense; is that your finding?

A. In my opinion that is correct.

Q. All right. Now, Doc, you took a history as you always do; didn't you?

A. That's correct.

Q. And you found as part of that history that apparently his mother is hypomanic and has gastrointestinal problems like he does; is that right?

A. Based on his description – he didn't use the term "hypomanic," but based on his description – of course, I haven't seen her, but it appeared so from his description.

Q. All right. Then you went through his education, the fact he became a pharmacist. And you went through his social history, his dating relationships; did you not?

A. That's correct.

Q. All right. Now, did you have occasion to explore his contact with alcohol and/or drugs?

A. Yes.

Q. And what did you find as to that, Doctor?

A. Well, –

Q. Was there any pattern that you found?

A. Oh, absolutely.

[p. 44] Q. What was that, sir?

A. Well, I always start out by asking how – when they started using alcohol or drugs. He started drinking at age 19. He usually drinks beer, but on weekends he says he would drink vodka and tonics. He told me that he has a low tolerance to alcohol and gets high very fast. And that is very consistent with the testing. There are certain types of individuals with certain personality characteristics that seem to be more susceptible to alcohol. And he has that.

The pattern he described to me was a pattern of alcohol abuse. I couldn't carry it to the next level of saying alcohol dependency, though I suspect that it may be. Part of the reason for that was that he is also simultaneously using drugs. And it's hard for him to evaluate how much of what he experiences is due to alcohol and how much is due to drugs.

He told me he started using drugs at age 21. Primarily opiates and most frequently Lomotil for both pain and depression. He tells me he's used it daily since age 21 to varying amounts. Sometimes a little, but sometimes quite a bit. He's also used anticolon (sic) – anticholinergics. And he says – and he's a pharmacist, I'm not – but he says they have a synergistic effect that one increases the effects of others. I can't comment on that. That's just his indication.

Q. Did you find there was any pattern of drug dependence, Doctor?

[p. 45] A. Absolutely. When you use those kinds of drugs to those (sic) degree daily for – at the time I saw him like 19 years or 18 years, that is clearly a pattern of drug dependence.

Q. Doctor, did you go into the events leading up to the charges for which he has pleaded guilty?

A. Yes, I did.

Q. All right; what did you find in that respect, Doctor?

A. Well, he indicated to me that he had lived in his house for about six years. He did not know when the Fowlkes family moved in. He told me that he did not know that the family that lived in that house was black until he was told that by the detective during the interrogation.

He also says that the detective told him about prior incidents. And he told me he didn't remember committing those acts. What he tells me

Q. That was the month before, I take it, November of '94?

A. That's correct.

As part of taking his history of alcohol and drug use, he told me that he gets violent thoughts whenever he drinks to excess. And he told me that that's what happened on 12/22/94, as well, that he says he had feelings that he wanted to destroy something. He had feelings that he wanted to do something destructive, to do – and he has had such feelings before and has acted on them before. He told me about a prior incident of [p. 46] getting drunk and ripping a gate off a house. Things of that nature.

Excuse me. And he describes what he did as, quote, "An impulsive, destructive thing." He says that the door

caught his attention because it was purple and had a large pane of glass. And he just had the thought to destroy it. And that's why he shot at it. He just had a feeling on the way home from the bar while he was drunk and drug-intoxicated that he wanted to break something. And he told me it didn't matter what it was. And that caught his attention.

Now, I went back with him over the course of his alcohol and drug use during that day. And he indicated to me that it started about 12:30 in the afternoon. And though there were times – there were some times during the day that he drank, sometimes he used drugs and sometimes he did neither. But that overall in the period from 12:30 in the afternoon to around 1 a.m. he believes he consumed approximately eight vodka and tonic.

There were two different periods when he drinks. And he said I – about the first period that he thought he had four, more or less. And the second time three or four. So it could be six, it could be nine. The best estimate is about eight from what he told me.

He also took four to six Lomotil, one Dilaudid and two Ativan.

[p. 47] And he told me that after the shooting he went home, put the gun behind the door of the attic, and went to sleep. And told me that he was in bed about 20 minutes when the police arrived. He told me that during the time he spoke to the police – well, first at the house and later at the station, that he still felt intoxicated from the drugs and alcohol during that time.

He also told me that at first – you know, he acknowledged – I had the records – that at first he told the police he didn't do it. Then he thought if he cooperated with them – his term would be they, quote, "They would be less stringent" unquote, with him. He told me that, for example, he did not know it was a black family. Yet when they told him that he indicated that that's the reason he gave (sic) the shooting – he did the shooting.

He says that he was embarrassed. He says that they pressured him. He was scared. He was anxious. These are the things he told me, but they're certainly highly consistent with my analysis of his personality. And he said the officer basically said to him, "If you make it easier for us, we'll make it easier for you." And so he went overboard, according to what he told me, trying to cooperate with them just to get out of the situation as quickly as possible.

Q. Now, Doctor, can you – do you have an opinion – and by the way, each of the opinions that you rendered in this case [p. 48] must be within a reasonable degree of psychological probability to be admissible in court. I want you to understand that. And have your opinions expressed so far been consistent with that standard?

A. Yes, and –

Q. And if you can't answer any of my questions or the Prosecutor's questions within that standard, within a reasonable degree of psychological probability, you will so tell us or tell the Court; will you?

A. I can, yes. And those apply to my psychological testing, findings and my opinions about the – what I sometimes refer to as the psycho-legal questions.

Q. Doctor, can you tell us within that standard whether the psychological objective testing that you administered was consistent with the information that you obtained from the interview and the history?

A. Yes, it was, absolutely.

Q. And was it also consistent with your clinical impression that you formulated upon meeting him and seeing him during the period of time you were in the jail?

A. Yes.

Q. All right. Now, did that objective testing indicate whether or not there is pathology as to this defendant?

A. Yes.

Q. Okay; what did it indicate?

[p. 49] A. Okay. First of all, he is an anxious individual. And his anxiety interferes with his attention and his concentration. He has an extremely poor self-image, particularly with a person who has his level of academic and occupational accomplishments. The measures we have of identity and self-esteem and self-concept – we find that if a person has achieved academically and occupationally that they generally have a stronger self-image. And his is very weak, despite that. Along with anxiety. He is very insecure. He's a very sensitive person. He feels very inadequate and insecure as a man. And part of what happens, I think, with these violent thoughts is a way of compensating for those feelings of inadequacy.

I also mention that on interview he showed some obsessive-compulsive traits. And that was evident on the testing, as well. What that means is he tends to have a

very rigid personality structure. He's very concrete. He's very literal. He also is literally obsessed with collecting things and accumulating things. Part of obsessive-compulsiveness is also perfectionism or a desire for perfectionism. And I think what happens is that he sets certain goals for himself that are beyond his reach, so they're not possible for him. And then when he cannot reach them he ends up having sort of chronic ongoing feelings of dissatisfaction and anger.

He also tends to project his problems. So rather than, for example, seeing his own contribution through relationship [p. 50] problems with women, for example, he tends to project the problems onto others. Saying, for example, "Well, it's the fault of other men. They interfere. They're jealous of me." Things of that nature.

He does not have a very positive view of people. He generally anticipates that people will be annoying, dishonest, things of that nature. I think he has never felt that he fits in with people. He says that he was very shy and bashful as a child. And the testing shows that he's very fearful of rejection from other people, particularly women.

He has a high tension level. He's got a low frustration level. A low level of – low tolerance from both frustration and anger. Little things that wouldn't bother most people, as a result, annoy him. And in taking his occupational history, for example, he did indicate to me dealing with people on a day-to-day basis – the things he complained about were the things that we all deal with on a day-to-day basis; people being impatient, people wanting to get waited on quickly. Things of that nature.

Yet, because of his chronic tension and because of his obsessiveness, he had a great deal of difficulty dealing with that.

The testing also shows that his anxiety has what we call a somatic component. That is –

Q. What do you mean by that, Doctor?

A. – that is, it comes out in physical symptoms. [p. 51] Gastrointestinal symptoms, as well.

Q. Is that the reason he was taking the drugs you indicated earlier, the Lomotil and the Dilaudid, and so forth?

A. Well, that's the reason he gives that he was taking the drugs. In part, for the pain and the physical symptoms. In fact, though I don't think he has insight into it completely, the drugs also helped him blot out a lot of these kinds of feelings I'm talking about, so that he didn't have to live with them day to day. And so that that high tension level that he constantly felt could be reduced by the drugs.

The testing also suggested that he would go through cycles. Part of that will be that at times he'll have this sort of hypomanic nervous energy and do a lot that I mentioned. And other times he'll be depressed and lethargic. I also see a cycle in terms of having these sorts of angry kinds of thoughts and then drinking and doing something and then feeling genuine remorse and guilt afterwards. But not having the coping mechanisms to deal with what caused it in the first place. So even though he is remorseful and doesn't want to do it again, the tension builds up again and the cycle repeats itself.

I already mentioned he has to be concrete, very literal and very precise. And that need within him leads to distortions in perception. There are also distortions in perception due to his concerns about masculinity, his feeling inadequate as a man. And when these kinds of feelings arise he [p. 52] shows interference with not only the control of his feelings and his thoughts and his behavior, but also with his ability to perceive things accurately, to concentrate. Things of that nature.

Q. Doctor, let me ask you this: What, if anything, does the objective testing suggest in terms of anger or handling anger?

A. He exists at two levels. His personality is not well integrated. On the outside he has this obsessive-compulsive sort of thing which leads to overcontrol of the anger. But underneath the testing shows there's a great deal of anger. And what happens is that when he overdoes the drugs or the alcohol, particularly alcohol, or is in an emotionally-arousing situation, then we call the process disinhibition. The angry impulses that are usually inhibited and overcontrolled are disinhibited. That's when they emerge. And that's when he does the kinds of things that led to these charges.

Q. Doctor, did you come to a diagnosis of this individual?

A. I came to six diagnoses of him, yes.

Q. Well, what are they, sir?

A. The primarily diagnosis is obsessive-compulsive disorder. The second is psychlosymic (phonetic) disorder. Now, –

Q. What does that mean, Doctor?

A. Yeah. Most people are familiar with the term "manic [p. 53] depressive or bipolar." Psychlosymic is similar, in that the individual's moods go from being excited and hypomanic and elated to being depressed and lethargic. But the swing is not as great and the impairment is not as great as in bipolar disorder. Drug dependence, alcohol abuse –

I also diagnosed an impulse disorder of kleptomania. I know Your Honor is aware of the accumulation of guns, ammunition. But also various other tools, metallic objects. And he has had an obsessive need to accumulate things to the point where he has shoplifted even things like nuts and bolts. And, again, this is a man who feels so vulnerable and inadequate that there's like a void inside of him. The more things he can collect and accumulate the more he thinks he's filling that void. But since the void is physiologically based it never really satisfies him.

Q. Doctor, let me ask you this: Is there any way of knowing for what period of time the defendant has suffered from these disorders?

A. Yes.

Q. Can you tell His Honor?

A. Yeah, not in terms of an exact date, but most of these kind of disorders have their roots by late childhood, early adolescence, and develop from there. As far as the obsessive – compulsive disorder and the psychlosymic disorder, certainly by early adulthood.

[p. 54] I've already indicated that based on his own report the pattern of alcohol abuse began at around age 19 or 20, and of drug abuse at age 21.

Q. So then the fall and winter of 1994 he was suffering from these disorders?

A. Absolutely.

Q. All right. Now, what synergistic effect is there on the ability to exercise judgment and opinion for an individual such as this one?

A. Well, you've got – you've got two things operating in a – or three, really. You've got the synergistic effect of the various drugs and the alcohol. You've got the combination with an individual who is anxious and overcontrolled, but who is disinhibited under the effect of those drugs and alcohol. And you've got an individual who when he becomes emotional also shows interference. So all three factors really combine into fear of judgment and reasoning and impulse control.

Q. Doctor, let's talk about the statements that Charles gave to the police. Now, is there a way of your knowing whether Charles, as opposed to an average, normal human being, would be more likely, less likely, or as likely to be misled by someone who was questioning him in a controlled atmosphere, like a police station or an atmosphere where police were around? Can you tell His Honor?

A. Yes, absolutely we can.

[p. 55] And the basis for that is this, Your Honor. Anybody can tell me anything. And I've, you know, evaluated literally thousands of people that have been

interrogated by police. And they can tell you, you know, the whole range of things. I'm sure Your Honor has heard them.

What I look for is a consistency between what an individual tells me and what I find on the testing. So anybody can say, "I was coerced, I was influenced." But there are some people who clearly have the personality structure where that's not the case. And there are others that do have that personality structure.

Here we have a very anxious man. One who feels very vulnerable. One who feels very inadequate. And one who would say or do just about anything to get out of a frightening anxiety-arousing situation.

Q. Even tell a lie?

A. Tell somebody a lie if it was what he thought that person wanted to hear in order to stop the interrogation and let him out of the situation.

Now, let me say, Your Honor, I don't know what the truth or falsity is. That's not my role. I'm only saying that he has the kind of personality of an individual who would do that to get out of this kind of situation.

Q. Thank you, Doctor.

MR. O'NEILL: You may cross-examine.

G. Cooke – Cross

[p. 56] MR. LUTHER: Thank you.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, are you a psychiatrist?

A. No, I'm a psychologist.

Q. Do you have a medical degree?

A. No, I have a doctorate in psychology.

Q. In psychology; –

A. That's correct.

Q. – okay. Sir, would you agree that psychology is not an exact science?

A. I would agree.

Q. Isn't it true that two different psychologists could reach completely different opinions based on the same facts?

A. That depends. That depends on when you use the term "facts," whether you're talking about psychological symptoms or facts in a criminal case of a – of a – of a factual as opposed to an opinioned nature. You'd have to clarify that a little for me.

Q. Okay. Let's say two psychologists were asked to evaluate a patient.

A. Yes.

Q. Isn't it true that they could come up with different analyses?

A. Okay. That's why I said that the answer to that question is it depends on the nature of the illness. There's well-[p. 57] documented research – it's actually contained in the DSM4, the most recent one – that the reliability of diagnosis varies depending on the type of disorder and its severity. So in some cases psychologists can see the

same patient and disagree markedly. In other cases there's almost a hundred percent agreement. It depends on the nature and severity of the pathology.

Q. So you would agree that two different psychologists can come up with different diagnoses on the same patient?

A. In some cases, yes.

Q. Okay. Sir, how many times did you meet with the defendant prior to today?

A. One time.

Q. Okay. And what did – you learned about his educational background; is that correct?

A. Yes.

Q. In fact, he did very well in high school; isn't that true?

A. I believe that's correct, yes.

Q. He received high grades in high school?

A. I'd have to go back to check the exact grades, but he told me he was a good student.

Q. Yes. And, in fact, he went to college, as well; is that correct?

A. Yes.

[p. 58] Q. And, in fact, he graduated Rutgers University?

A. Yes.

Q. And he completed not a four-year study, but a five-year study in pharmacy; is that correct?

A. Well, the pharmacy program is five years. He indicated to me that it took him six years to complete it because at various points he didn't take it seriously and had to take extra time.

Q. But he did graduate with a degree in pharmacy; correct?

A. Yes, he did; that's correct.

Q. Okay. And isn't it true that you also administered some testing with respect to his IQ?

A. That's correct.

Q. And you found that his IQ came out as a prorated verbal IQ of a-hundred-and-four, which is in the average range and at the 61st percentile of the population; is that correct?

A. That's correct.

Q. However, you also concluded that anxiety is currently interfering with his attention and concentration. And that it is likely that his potential lies at an IQ of approximately 110, which is at the 75th percentile, and is more consistent with his academic accomplishments; isn't that correct?

A. Yes.

Q. So it's fair to say that Mr. Apprendi is an intelligent individual?

[p. 59] A. Yes.

Q. Okay. Did Mr. Apprendi ever have any previous treatment for any psychiatric disorders?

A. No. I questioned him about that. He told me that he felt he needed it and probably should have, but that he has never gone.

Q. Did he ever have any previous institutionalizations for any psychiatric disorders?

A. No.

Q. Did he have any previous treatment for any alcohol rehabilitation?

A. No.

Q. Did he ever have any previous treatment for any drug rehabilitation?

A. No.

Q. And, in fact, in 1994, at the time of these crimes, he was employed as a pharmacist; was he not?

A. Yes.

Q. And, just briefly, what does being a pharmacist entail?

A. Do you mean what are the job –

Q. What are the –

A. – duties of a –

Q. Very briefly, what are the job duties of a pharmacist?

[p. 60] A. There I suppose I'm a layman, like the rest of us. I – as far as I know from just personal contact,

the mixing of various drugs, preparing the drugs, being knowledgeable about their effects in order to both put on labels and to inform people of their side effects and what you shouldn't take with what and so on.

Q. It's a very responsible position; is it not, Doctor?

A. I would say it's a – a – a position that certainly should be taken very seriously and responsibly, yes.

Q. Okay. Is this defendant psychotic?

A. No.

Q. Is he schizophrenic?

A. No.

Q. Was he the victim of any childhood abuse?

A. Not to my knowledge, no.

Q. Okay. You've indicated that this defendant is easily led; is that correct?

A. Yes.

Q. And that in your opinion, based on a reasonable degree of psychiatric (sic) –

A. Psychological.

Q. – certainty – or psychological certainty, you believe that he just admitted to the police what they wanted to hear; is that correct?

A. Well, what I'm saying to you is that his personality is [p. 61] consistent with an individual who in an interrogation situation where his anxiety would be aroused is the kind of person who would just – you know,

in his own mind he'd be saying to himself, "I've got to tell them whatever they want to hear so I can get out of this. Get –

Q. Okay.

A. – out of this situation. It's overwhelming."

Q. So that in your opinion if this defendant was told by the police that there were four prior shootings, that he would admit to those four prior shootings; correct?

A. It's my opinion that he would focus in on what he thought they wanted to hear. If – if he felt that they wanted him to admit to prior shootings then he would.

Q. Okay. Sir, how many prior shootings did this defendant admit to you? Strike that.

How many times did this defendant admit to you that he fired a weapon at the Fowlkes residence?

A. He indicated to me that the only one he remembered doing was 12/22 of '94.

Q. Okay. So in your interview with him he only admitted to doing one shooting; is that correct?

A. That's correct.

MR. O'NEILL: Well, excuse me. I think the word was "remembered."

THE WITNESS: Remembered.

[p. 62] THE COURT: Very well.

CROSS-EXAMINATION BY MR. LUTHER:

Q. He only remembered one shooting?

A. That's what he indicated to me, yes.

Q. Okay. Didn't he specifically tell you that he admitted to doing another shooting on a prior occasion because he wanted to get the interrogation over with and didn't care what he said?

A. Yes, that's what he – he says he told the police that to get the interrogation over with. But he told me that, in fact, he never remembered committing the act that he told the police he did, the prior act.

Q. Okay. Sir, are you aware that since you've spoken with this defendant that this defendant has pled guilty under oath before this Court to a total of two shootings at that residence?

MR. O'NEILL: Objection; irrelevant.

THE COURT: Well, no, I don't think it's irrelevant.

MR. O'NEILL: He's already testified that he admitted telling the police he did a previous shooting, although he didn't remember it. So how's the relevance as to what he's pleaded guilty to?

THE COURT: It goes to the consistency of what the doctor says is his personality of avoiding unpleasant situations that he'll (indiscernible – voice too low) truths.

[p. 63] MR. O'NEILL: Very well, sir.

THE COURT: I think that's where the Prosecutor's going.

MR. LUTHER: Yes; thank you, Judge.

THE COURT: Go ahead.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, were you aware that this defendant, since he spoke with you, has admitted under oath to this Court to two prior shootings at the same residence?

A. Two prior shootings?

Q. Yes.

MR. O'NEILL: Excuse me. The plea was to two shootings in total, not to three.

MR. LUTHER: Two shootings in total; that's correct.

MR. O'NEILL: So it's not two prior shootings to this. It's one prior to this and this; two. Am I right, Mr. Luther?

THE WITNESS: That – that was my confusion. I thought he had pled guilty to one prior shooting and this shooting, yes.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Okay.

A. I had become aware of that, yes.

Q. Sir, isn't it true that the reliability of your opinion depends at least in part on the truthfulness of the [p. 64] defendant?

A. I'm always asked that question. And the answer is no, because my opinion – and I've been very careful to – to describe it this way – is that what he tells me is

consistent with my test findings. I don't know whether he's telling the truth or not. And I don't use that. That's not for me. That's for the Judge or a jury to determine. And I don't use that at all. He can tell me anything. But he can't have the tests come out any way he wants them to. And so it's the tests I rely on.

Q. So your testimony is that it's irrelevant what this man tells you as to whether or not it's truthful?

A. In a sense, yes, because I have no way of knowing what's truthful and what's not. No psychologist – a psychologist can talk about an individual's general tendency to be honest and truthful versus dishonest and manipulative. But no psychologist can say in any one instance whether an individual is telling the truth or telling a lie. We're all capable under certain circumstances, no matter what our personality is, of telling a lie. And that's why psychology has never been able to sort that out about a single instance.

Based on that, people who are trained in forensic are basically trained and experienced to say, "You know, look at his thought processes as he talks to you. Look at his emotional responses. Look at the things that indicate how he [p. 65] might see himself or others. But don't draw an opinion about the truth or falsity of what he tells you, because we can't do that." We have no more ability to do that than a lay person.

Q. Obviously, sir, there's no way you can tell whether or not Mr. Apprendi was truthful with you; correct?

A. That is correct.

Q. Sir, my question is: Isn't it true that the reliability of your opinion depends at least in part on the truthfulness of what Mr. Apprendi tells you?

A. Again, the answer is no. My opinion –

Q. Well, sir, wouldn't it be better than not to –

MR. O'NEILL: Well, he didn't finish. Excuse me, counsel.

THE COURT: No, he's answered the question. Go ahead.

MR. LUTHER: Thank you, Judge.

THE COURT: The answer's no.

The next question.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, wouldn't it be better than to simply not even interview the defendant?

A. No, because as I said there are other things you're looking for in the process of interview. Not so much the content of what the person says – the same thing is true with the history. But I look at the way he relates to me, his [p. 66] thinking processes, his emotional responses.

For example, if I'm talking to a person about what happened to them, whether it's the (sic) criminal case or something else, and they get very anxious and upset and flustered, that information that I have is very important. On the other hand, if they're very cool and aloof and distant, that information is important. Both of those are

important, independent of the content of what they've told me.

Q. So what you're –

A. And that's why we do interviews.

Q. – so what you're looking at is the test results and the demeanor. And the content of what the man says is not important?

A. Content is relatively unimportant. I think I said this in my direct testimony. Anybody can tell you anything they want. I have (sic) people walk in and told me, you know, "I heard a voice of God telling me to do it." Now, that content is unimportant to me unless when I test them and evaluate them I find that they're psychotic. And I find that they have other behaviors consistent with a psychotic disorder. Then the consistency becomes important. But what they say in and of themself does not.

And the same thing applies here.

Q. So it would have no impact on your opinion at all the fact that he told you that he did one shooting and told Judge [p. 67] Ridgway that he did two shootings; correct?

A. That's not exact –

MR. O'NEILL: That's not – that was not the testimony, Judge. The testimony was that he told the police he did a shooting previous to this one, but he didn't remember it. That was his testimony.

MR. LUTHER: Judge, it was more than that. He told the doctor and the doctor acknowledged that Mr.

Apprendi specifically told him that he admitted to one prior shooting to "get the interrogation over with and didn't care what he said." I'm reading from the gentleman's report.

THE COURT: Ask him the question. What's the question?

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, is it your testimony that it doesn't effect your opinion at all, the fact that Mr. Apprendi told you that he did one shooting and told Judge Ridgway that he did two shootings?

A. Again, the premise is incorrect. That's not what he told me. He told me that he told the police that he had done a prior shooting. He told me that he didn't remember doing such a shooting, but that he did tell the police that he had.

Q. Fine.

A. I – I – I can only tell you what he told me, as far as that goes, –

Q. He told you –

[p. 68] A. – that he didn't remember doing a prior shooting, though he told the police that he had done one. And, again, I don't know whether that's a truth or a lie.

Q. Okay. Sir, he told you he had only done one shooting that he recalled; is that correct?

A. That he recalled; that is correct.

Q. Now, he told Judge Ridgway under oath that he did two shootings. Are you aware of that?

MR. O'NEILL: Judge, I'm going to object. This is badgering. We've been over this now several times, the same content.

MR. LUTHER: Judge, I'm simply trying to get the witness to answer –

THE COURT: Objection overruled. The objection's overruled.

Go ahead.

MR. LUTHER: Thank you.

THE WITNESS: I am aware of that.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Okay. You're aware that he told you that he did one shooting and he told Judge Ridgway he did two shootings?

A. I'm aware that –

Q. Does that have any effect at all on your expert opinion today?

A. There are two factors to that. And one of that (sic) is [p. 69] that he told me, first of all, that he remembered doing the one shooting. I don't know what has convinced him, in terms of whether legal advice, evidence, or whatever, to say – despite that to the Judge that he has had – you know, that he committed a second shooting. I don't know. I can only go with what I have. I didn't come back to him and say, "Well, how come you told me you only remembered one but you pled guilty to another?" I don't know what reasoning or legal advice or evidence either led him to admit it, even though he may

not still remember it, or led him to remember it subsequently.

Q. Sir, do you understand my question?

A. I believe I do.

Q. Okay; could you please answer it?

A. I think I have.

MR. O'NEILL: Well, I object to that, Judge.

THE COURT: No. No. No. No, he's answered the question the way he thinks is an appropriate response.

Mr. Luther, if you want to rephrase the question, go ahead, do so, but don't argue with the witness.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, would it have any effect on your opinion at all the fact that he told you that he fired once at the home and he told Judge Ridgway that he fired twice at the home?

A. In terms of my opinion about his diagnosis, absolutely not. It's totally independent of anything he's told me. In [p. 70] terms of whether he has the kind of personality of someone who is easily coerced or led in an interrogation situation, again the answer is no, because he has a personality consistent with that. It would not effect those opinions.

Q. Okay. And in your interview with Mr. Apprendi he indicated to you that he fired at the door because it was purple; correct?

A. Well, no, it caught his attention because it was purple and had a large pane of glass. That's what he told me.

Q. And that was his reason for shooting at the door?

A. Well, he said he felt destructive. He said he had the same feelings he often gets when he drinks too much. He had these violent feelings. And then that is what attracted his attention. And so that is what he shot at.

Q. Okay. And in your interview with Mr. Apprendi, Mr. Apprendi also admitted to you that he lied to the police at first by denying that he had done the crime at all; is that correct?

A. That is correct.

Q. And that later on he told the truth by admitting firing at the home; is that correct?

A. That is correct.

MR. LUTHER: I have nothing further, Judge.

THE COURT: Anything else?

MR. O'NEILL: Nothing further, Judge.

[p. 71] THE COURT: Very well; thank you. You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Any other witnesses?

MR. O'NEILL: May I have one minute, Judge, or half-a-minute, please?

THE COURT: (No verbal response)

(Whereupon defense counsel and client conferring)

MR. O'NEILL: The defendant will testify, Judge, briefly.

THE COURT: Well, wait a minute. If he's going to testify we're going to take a short recess, 'cause I don't know how brief it's going to be, due to the fact that Mr. Luther –

MR. O'NEILL: For me it'll be brief.

THE COURT: – has to cross-examine. All right.

MR. O'NEILL: Thank you, Judge.

THE COURT: We'll take a 15-minute recess.

(Whereupon a brief recess was taken at this time)

(Whereupon Judge Ridgway briefly dealt with an unrelated matter at this time)

THE COURT: Are you going to examine your client from up here or are you going to go back and sit down?

MR. O'NEILL: I'd like to sit down here, Judge, but I'm not going to do that.

MR. APPRENDI: Well, I'll stand up.

[p. 72] MR. O'NEILL: Can you squeeze in there?

MR. APPRENDI: (Indiscernible – voice too low) on the Bible.

THE COURT: Sheriff, – (indiscernible – voice too low).

All right, Mr. O'Neill. –

MR. O'NEILL: Thank you, Judge.

THE COURT: Put your left hand on the Bible and raise your right hand.

CHARLES APPRENDI, JUNIOR, DEFENDANT, SWORN

THE COURT: And your first name is?

THE WITNESS: Charles.

THE COURT: Charles.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. All right, Charles. Sit down, relax. How do you feel now?

A. Oh, a combination of anxiousness and upset.

Q. Okay. I'm going to ask you questions. Not many. Just answer them the best you can; okay?

A. Yes.

Q. If you don't understand my questions or Mr. Luther's questions or the Judge's questions, just tell us. We'll try to make them understandable to you; all right?

A. Okay; thank you.

Q. Okay. Let's go back to December 22 of 1994. Do you [p. 73] remember what condition mentally and physically you were in when the police arrived at your house at 3 o'clock or so that morning.

A. Well, I guess the best way to describe it was like – it was a strange sensation. I was – I wasn't thinking. I had thought – I knew what I had just done. I – I was like in – in a cloud somewhere. I was extremely exhausted and depressed and everything else. I was just – I was just like there but I wasn't there. I wasn't physically – I didn't look like I was physically drunk because, you know, I wasn't staggering or making bad sounds or anything like that. But it was more mental – the mental state is more important.

Q. Why? What you had just done? You mean the shooting?

A. Yes.

Q. You knew you had done that?

A. Yeah. And –

Q. Okay.

A. – I was upset immediately. I just didn't know what I was doing.

Q. Now, approximately how long after you got home after the shooting was it that the police arrived? Can you tell us that?

A. I don't think it could have been longer than 15, 20 minutes, –

Q. Okay.

[p. 74] A. – something like that.

Q. Where had you been before the shooting?

A. At the Greek Island Restaurant and Bar in Vineland.

Q. Okay. Just very briefly can you tell us if you remember what you had to drink and what, if anything, you took in terms of medication that date?

A. Well, I – it's – the exact count is hard to tell. But I started very early in the morning. Usually every – almost every morning I had to take a couple Lomotil because of the pain in my abdomen.

Q. You have a gastrointestinal problem?

A. Yes, they – they say it's irritable bowel syndrome, nerves and –

What else do you take, if anything?

A. And – well, then I went to another restaurant, the Windjammer, about 12:30. And I had some – I had some drinks. I had like three or four drinks there, vodka and tonic. And then after that I got very sick to my stomach. And that's when I took a lot more other medication. I took a couple more Lomotil. That didn't seem to help.

Q. Well, you're a pharmacist. What does Lomotil have in terms of an effect on the one who takes it? What's the purpose of it?

A. Well, the basic effect is a sense of euphoria. But it also has the secondary effect of stopping spasms in the

[p. 75] gastrointestinal tract.

Q. What other drugs, if any, did you take?

A. I took one Dilaudid, I think, which is also an opiate. And then a little bit later I took two more Ativans.

Q. And what's the effect of Ativan?

A. That's a minor tranquilizer.

Q. All right. Did you have anything else to drink or in terms of medication before this shooting event?

A. Oh, yeah, I – later on that night – that's the reason why I took so much medication, because I wanted to go out to another Christmas party. And I ended up not staying there. Then I went to the Greek Island where Gary was and –

Q. Gary Castellini?

A. Gary Castellini.

And I had – I had another maybe three, four, five or – five drinks or something like that. And then when I got home the incident I had a – I took a couple more Ativans to help me sleep.

Q. Then you went to bed?

A. Then I went to bed, yeah.

Q. And then the police came?

A. Yeah. Yes.

Q. And they questioned you? And this was about 3 in the morning or something?

A. Yes.

[p. 76] Q. Okay. And then they took you down to the station where you were questioned a second time around 6 in the morning by Detective/Sergeant D'Augostine; is that correct?

A. Yes.

Q. All right. Now, before you were questioned by Detective/Sergeant D'Augostine, did you know that there was a black family living in the neighborhood?

A. I had occasion (sic) before. I knew there was – I thought there was a couple black families on Chestnut Avenue out to the – further east of my parents house.

Q. Do you know the Lake family?

A. I don't – I don't know them by name. All I remember is I knew there was a black family. It was like a little green house on the north side of Chestnut Avenue. And it had like a – I think he had like a – like a Mexican with a wagon wheel or something like that. That's all I remember about the house. I think there was some brick in it. But –

Q. The blacks lived there?

A. – I did know, yeah. Yeah. I didn't know their names, that's all.

Q. Were you aware of the Vineland State School home on East Chestnut Avenue where there were blacks? Are you aware – were you aware of that?

A. I knew where it was, yes.

Q. Okay. Now, let's get back to the interrogation by [p. 77] Sergeant D'Augostine in the police station about 6 a.m. Who first mentioned the word "race or racial?" or who first injected the term "race" into the inquiry by Detective/Sergeant D.'Augostine of you?

A. Detective D'Augostine did.

Q. Do you remember what he said to you in that respect?

A. Yeah, I can remember almost exactly what he said. He said – he said, "Were you aware that there was a black family in that house?" And then –

Q. And what was your response?

A. – and then I said – I said, "No, what's that have to do with it?"

Q. And what did he say, if anything?

A. Well, he left (sic) it go for a little while. But he kept on asking me the same thing. That's what – that's what kind of like led me to believe that he was hunting for a racist motive for what I did.

Q. After you said to him, "What's that got to do with it," meaning race, what did he say, if you remember?

A. Nothing.

Q. Okay. But he kept coming back to it?

A. Yes.

Q. All right. Did there come a time when you told Detective D'Augostine that you shot up that house, the Fowlkes house, because you wanted to keep people –

black people out of [p. 78] the area or something to that effect?

A. That's what I told him, but it wasn't true.

Q. Well, why'd you tell him that?

A. Because I was – I was very scared, very out of – irrational. And he had – he made some – he made some threats. And –

Q. What do you mean by threats? What did he say to you?

A. Well, he made it sound like if I cooperated with him and said, like, is – this is the way I took it, anyway – and said what he wanted me to say, that he would take it easy on me if I took it easy on him.

Q. Well, what kind of threats did he make to you? Tell me and tell the Judge specifically.

A. Okay. Specifically, there was a lot of smaller things. But he started on telling me how bad jail was. He mentioned three things that – that really scared me even more. The first thing was that he told me that there was a combination of a lot of homosexuals and AIDS in jail. And he said something like – like, "A pretty little thing like" – this is exactly what he said. He said, "A pretty little thing like you is going to be taken advantage of." And when you – when you think about – at least when I thought about the combination of homosexuals and AIDS and if I – if I contracted AIDS I know what the result of that is. That's the first thing he said to scare me.

[p. 79] And then he said that – he said that if he charged me with a racial crime against a black family – he

told me how – there was a very large percentage of the population of – of prison was blacks. And he said – he said, "At best, you're going to be like worked over or beat up quite often when they find this out." And nobody was going to protect me. And that just –

And then, like I said before, after that he told me that if I cooperated with him he would try to make it easier on me. He said –

Q. So you lied?

A. Yes.

Q. And you knew you were telling a lie to him?

A. Yes, I did. But what I didn't know about the – about *Miranda* was I thought if you had gave a statement you had to sign it or get it recorded. So I thought that I was just like being slick by doing it like that, just to get the interrogation over with. So –

Q. So, in other words, –

A. – I just said it. I just said it.

Q. – you didn't sign the statement or give a reported (sic) statement – you could get out of the interrogation and it wouldn't hurt you?

A. That's what I thought, yes. That was it. Like I said, I wasn't irrational, but that's the way my – my thinking process [p. 80] was going on.

Q. Did you tell Detective/Sergeant D'Augostine what you have told the Judge as to what you were drinking and taking in terms of medication?

A. Yes, I did, exactly. And I also named the name of the drugs and the strengths. And the fact that I was drinking vodka and tonics. I told him exactly what restaurants I was at and who I was with. I tried to – I – I – I tried to say – I was signin[illegible]ything and trying to cooperate with them just so I could, like, get out. But I – I tried to – I let them in the house. I signed a search warrant. I mean, I allowed them to search my house. I basically was just doing anything they wanted me to do.

Q. You signed a paper allowing them to search the house?

A. Yes.

Q. Okay. By the way, did Detective/Sergeant D'Augostine ever give you any statement or report of what you had told him and asked you to read it and sign it?

A. No, he did not.

Q. Are you a racist?

A. No, sir.

Q. Did you have any racist material in your home by way of literature, videotapes, books, of any kind, newspapers?

A. I did not have anything like that at that time or ever in my life.

[p. 81] Q. Are you a member of any racist group, like the Ku Klux Klan, Skinheads, Neo-Nazis, or anything of that sort?

A. No, I am not at the present time and never in my life have I been.

Q. Let me ask you this: You've heard all these witnesses. You've heard white people, black men, a couple affidavits of black men. Is it fair to say that you've had a lot of interaction both socially and at work with black people?

A. Well, I can't – it's hard to say a – percentage-wise, but a certain percentage with – no, never any problems, never. And I've had – I've always had a couple black friends. Even in – in high school, if you could go back to high school. College, we had black people in the fraternity.

Q. You heard one of the witnesses, did you not – I believe it was Judge Pagliughi – mention that you had gone to a black neighbor's home to fix a tire for him or something. Do you remember that incident?

A. Yeah, I did.

Q. Now, have you ever harbored any bias against African Americans?

A. No.

Q. Have you told people anything of a negative nature about African-Americans?

A. No.

MR. O'NEILL: Cross-examine.

[p. 82] CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, you mentioned some drugs that you took on the day and the night in question. They were Lomotil or Lomodal (sic)? What was the name of that drug?

A. Lomotil. Lomotil. That's close enough.

Q. Okay. And that would stop spasms in your gastrointestinal tract?

A. Yes.

Q. Did you ever take that before you went to work at the pharmacy?

A. Yes.

Q. Okay. You also mentioned that you had taken some Ativan. And that's a mild tranquilizer?

A. A tranquilizer, yes.

Q. All right. Had you ever taken that before you went to work at the pharmacy?

A. No, I only took it usually at night to help me sleep.

Q. Okay. And what other drug did you mention that you had taken on the day in question?

A. Dilaudid.

Q. And what does that do?

A. That's a very potent opiate that is for use for severe pain. I had some left over when I had a kidney stone and that's what I had in the house.

Q. And when did you take that?

[p. 83] A. About maybe 8 o'clock, something like that.

Q. And that'd be 8 o'clock on December 21, 1994?

A. 21, yes.

Q. 8 p.m.?

A. Yes.

Q. And that was used for pain?

A. Yes.

Q. And in the course of your employment at the pharmacy had you ever taken that drug before going to work?

A. No.

Q. Had you ever taken it at work if you had pain?

A. Dilaudid –

Q. Yeah.

A. – or Lomotils? Dilaudid, no. It's – I never took that.

Q. Okay. But you did take –

A. I had to take some Lomotil once in a while at work, yes.

Q. All right.

A. But never any tranquilizers.

Q. And you took the Dilaudid at 8 p.m.?

A. Oh, about. You know, I didn't –

Q. Okay, roughly.

A. – look at the clock.

Q. Right.

A. Roughly 8, 9 o'clock, something like that.

Q. And the –

[p. 84] A. Just not too long before I went to the bar.

Q. Okay. The Lomotil, when did you take that?

A. I took some in the morning and then I also took some, I'd say, a little bit earlier than the Dilaudid, maybe 6, 7 o'clock, something like that. It wasn't – it wasn't really effective enough, so I wanted to take something else because of the – I still had the pain and I wanted to go out that night.

Q. All right. And then you took the two Ativan when you got home after shooting at the door; right?

A. Yes.

Q. And that was to calm you down?

A. Calm me down, help me sleep.

Q. Okay.

A. Help me sleep, mainly.

Q. All right. Now, when was the last drink that you had on December 21, around midnight?

A. No, I left the bar about 1:30. I was drinking right up 'till 1:30.

Q. Okay. Did you tell Detective D'Augostine that you left the bar at about midnight?

A. No, sir. He never asked me what time I left the bar. I never told him anything.

Q. Okay. So what time did you have your last drink, 1:30?

A. About 1:30.

[p. 85] Q. And you spoke with Detective D'Augostine.

The *Miranda* card shows that you were *Mirandized* at 6:04 a.m. Do you agree with that?

A. Yes.

Q. So at the time you spoke with Detective D'Augostine you were not drunk; correct?

A. Legally or state of mind or anything else?

Q. Did you feel drunk when you spoke with Detective D'Augostine?

A. I was very dizzy and I was just – it's more of a state of mind. A lot of people don't realize in this case what happens when you take opiates and alcohol and you combine them. You don't get drunk like you're staggering around, or you can't say the alphabet or anything like that. It's like a – a stoned drunk. It's a much different type of intoxication than what classically people think when they're intoxicated. I was out of it. Believe me, I was out of it. I wasn't – I was not using my –

Q. I see.

A. – head, I wasn't thinking. I was –

Q. So the –

A. – irrational.

Q. – the last opiate that you took was at 8 p.m., which was ten hours before you spoke with Detective D'Augostine; is that correct?

[p. 86] A. Yes, but I was so exhausted at that time it didn't matter what I was taking. I was very down and depressed and scared, especially after he threatened me.

Q. Well – and the last time (sic) – the last drink that you had was at 1:30, which was four-and-a-half hours before you spoke to Detective D'Augostine; correct?

A. I had spoke to Detective D'Augostine at 2. I started speaking to him at 2 o'clock. He was at my house. He's the one who knocked on my door.

Q. Sir, I'm referring to the discussion you had with him at the Vineland Police Department where you signed the *Miranda* card at 6:04 a.m. Do you remember talking to him then?

A. Yes.

Q. All right. So my question, sir, is that: Isn't it true the last drink you had at 1:30 a.m. was approximately four-and-a-half hours before you spoke with him at the Vineland Police Department at 6:04 a.m.?

A. I didn't have a watch, but that's true. time it was.

Q. Okay; so your answer is yes?

A. Yes, but I didn't know what time it was.

Q. Sir, did you ever hear of the –

What high school did you go to?

A. Vineland.

Q. And when you were at Vineland High School were you a [p. 87] member of STAB?

A. Excuse me?

Q. Were you a member of STAB?

A. I never heard of it.

Q. Did you ever hear of Students United Against Blacks?

A. No.

Q. No, you're not a member of that?

A. No, sir, I don't remember any group like that.

Q. Okay. And, sir, we've heard testimony today that the purple door was what caught your eye and that's why you fired at the door there?

A. I just – I just was rioting. And glass and the purple door is what caught my eye, yes.

Q. Okay. And you just happened to have a .22 caliber Ruger rifle on you?

A. I picked that up at my house.

Q. Oh, I see, so you actually went home, picked up the rifle, and then drove by the Fowlkes residence; is that correct?

A. Yes.

Q. Did that rifle just happen to have some laser sights on it?

A. It had – contrary to the report, it had a laser sight, but there was no laser beam. It was a red-dot sight. It had nothing to do with a laser.

[p. 88] Q. Well, if you could explain that to us, sir, about the sight?

A. Okay. In – well, do you know – I'm sure most people know what a – a regular scope is, right, with the cross hairs, –

Q. Right.

A. – to make sure you're hitting your target?

Q. Uh-huh.

A. Well, a laser sight has no magnification to it. It's zero magnification. But you aim – when you're aiming, instead of looking through the back and the front sights you look at a red dot. You place the red dot where – approximately where you want to hit and you pull the trigger.

Q. Okay. And it's true that that sight increases accuracy; correct?

A. No, it's more like a – it was more like a toy. A scope would increase accuracy a lot more than a red-dot sight.

Q. You consider the laser sight a toy, sir, when attached to that .22 caliber?

A. Comparing to – comparing to target shooting or anything serious, yes, –

Q. Sir, my –

A. – it was just a sight.

Q. – question is: You consider the laser sight to be a toy?

[p. 89] A. That's what I consider it, yes.

Q. Did you also consider the silencer, which is attached to that rifle, to be a toy, –

A. Yes.

Q. – as well? Those are toys?

A. It was just an experiment.

Q. An experiment in what, sir?

A. Well, I had – I had a lot of horses next door, my next door neighbor's. And I didn't want to spook – spook the horses.

Q. Oh, I see, so –

A. I just wanted to see – I just wanted to see what I could do. I just – it was like a hobby, an obsession. I wanted to see what I could make, that's all.

Q. So you had the silencer on the gun because you didn't want to wake up any horses; is that your testimony?

A. Well, not at 2 o'clock in the morning, but –

MR. O'NEILL: He said "spook," Judge.

THE WITNESS: It was – it was there.

THE COURT: "Spook" is the term.

CROSS-EXAMINATION BY MR. LUTHER:

Q. You didn't want to spook any horses?

A. Spook the horses or to get my neighbors upset, yeah, 'cause I – I shot – just target shooting out – out in my backyard.

[p. 90] Q. Well, that silencer was on the rifle when you fired at the home on December 22nd; wasn't it, sir?

A. Yes, I just left it on, yeah.

Q. Wasn't it true that you didn't want to be caught and that's why you had the silencer on?

A. No, sir.

Q. No?

A. No, sir, –

Q. Okay.

A. – it had nothing to do with it.

Q. It just happened to be on there?

A. Yes, sir.

Q. Okay. Sir, you were aware, were you not, that the Fowlkes had moved into your neighborhood at some point in 1994?

A. Were – were I aware that they moved in July; is that what you said?

Q. At some point in 1994 were you aware that they had moved into the neighborhood?

A. No.

Q. Okay. Sir, do you remember talking with Detective D'Augostine on December 22nd, 1994?

A. Yes.

Q. Okay. Did you tell him that you did not personally know the Fowlkes or their family, but because they are black in color you did not want them in the neighborhood? Did you tell [p. 91] him that, sir?

A. I believe I said something like that but, again, it wasn't true.

Q. So you lied to the detective?

A. Yes.

Q. And that's because you thought it was in your best interest at that time to lie?

A. It was – it was a scare tactic. It was – it was in response to the way he was pressuring me.

Q. Sir, you've just admitted that you lied to the detective. And my question to you is: Did you lie to the detective because you thought it would be in your best interest to do so?

A. Yes.

Q. Okay. Sir, do you think it's in your best interest today to tell Judge Ridgway that you are not a racist?

A. Yes.

Q. Okay. And do you also –

A. And it's also true.

Q. – do you also admit, sir, that it's in your best interest today to tell Judge Ridgway that you were not

racially motivated when you fired those shots at the Fowlkes home?

A. I am not under the influence of alcohol or drugs today, and I am under oath. That's why I'm telling the truth today.

Q. Sir, now that you've said that would you please [p. 92] answer my question?

A. Yes, sir.

Q. My question was –

A. What was it again?

Q. – my question was: Don't you agree that it's in your best interest today, sir, to tell Judge Ridgway that you were not racially motivated when you fired those shots at the Fowlkes residence?

A. Yes.

Q. Okay. Sir, did you ever tell Detective D'Augostine that you knew there were black people at that residence because you had seen them outside in the yard?

A. I don't remember ever saying that, no.

Q. Sir, were you in court this morning when your attorney stipulated that you said that to Detective D'Augostine?

A. You're losing me.

Q. Do you know what "stipulation" means?

A. Is it stated or whatever?

Q. To agree.

A. To agree?

Q. Were you in court this morning sitting next to your attorney when your attorney agreed that you told Detective D'Augostine that you knew that black people lived at the residence because you had seen them outside in the yard?

[p. 93] MR. O'NEILL: I object to the form of the question. I don't believe that he can be cross-examined on the basis of what I said or may have said.

THE COURT: Oh, no, I disagree with you. If he (sic) makes a stipulation – if you make a stipulation on the record your client's bound by it. And supposedly (indiscernible – voice too low) agree to it.

MR. O'NEILL: Well, if Your Honor pleases, my recollection of what happened was that I offered to stipulate –

THE COURT: No. No. No. No, listen, Mr. –

MR. O'NEILL: – and then the sergeant testified.

THE COURT: – Mr. O'Neill, your objection's overruled.

Ask the question.

CROSS-EXAMINATION BY MR. LUTHER:

Q. All right. Mr. Apprendi, did you ever tell Detective D'Augostine on December 22nd of 1994 that you were just giving the Fowlkes a message that they were in your neighborhood?

A. I believe I said something like that, yes.

Q. Okay. For the record, although it's obvious, you're a white male?

A. Yes.

Q. Okay. And what race are the Fowlkes?

A. They're Afro-American.

[p. 94] Q. Okay. And you were aware of that before December 22nd of 1994; correct?

A. About the Fowlkes?

Q. Yeah.

A. No.

Q. When did you first learn that they were African Americans?

A. The morning of the 22nd, after Detective D'Augostine told me.

Q. I see. Sir, what's your – what was your address in December of 1994?

A. 4745 East Chestnut Avenue –

Q. Okay.

A. – in Vineland.

Q. And you're aware that the Fowlkes resided at 5211 East Chestnut Avenue in Vineland?

MR. O'NEILL: I have to object. He's already said that he didn't know –

THE WITNESS: The answer's no.

MR. O'NEILL: – that the Fowlkes were black or black people lived in that house.

THE WITNESS: The answer's no. I'll answer your question. The answer's no.

MR. LUTHER: Judge, that wasn't my question. My question was simply was he aware that the Fowlkes resided at [p. 95] 5211 East Chestnut Avenue.

THE WITNESS: I'll answer it again.

MR. LUTHER: I didn't ask anything

THE COURT: Just wait a minute.

MR. LUTHER: – about white or black.

THE COURT: Just wait a minute.

Do you understand the question?

THE WITNESS: Yes, I do.

THE COURT: What do you think the question asks?

THE WITNESS: The question is asking me if I were (sic) aware that the Fowlkes were in the house at 52 – I mean, were – had been residing at 5211 East Chestnut Avenue.

THE COURT: And what's your answer to that?

THE WITNESS: No.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, were you aware of any black families in your neighborhood in December of 1994?

A. I never – I knew there was a couple black families in the neighborhood, but I never paid that much attention to it, 'cause it didn't matter.

Q. You never paid that much attention to them?

A. No, except –

Q. Well, how –

A. – except for knowing that – that one house. I remember that one house.

[p. 96] Q. – well, how about the Lakes that you testified to? You testified –

A. That was the house.

Q. Yeah, you said they had a green house with bricks and a wagon wheel and a Mexican on the front lawn. But I guess you –

A. Yes.

Q. – weren't paying too much attention?

A. I was then.

Q. Oh, you were paying attention?

A. At that time, yes.

Q. Okay. Were there any other black families that you were aware of in your neighborhood in December of 1994?

A. Not that I was aware of, no.

Q. Okay. So the only black family that you were aware of in December of 1994 in your neighborhood was the Lake family?

A. Yes.

Q. And where did they reside in relation to you?

A. It was on the – gee, I only saw the house a couple times. It was on the north side of Chestnut Avenue. I think it was – I can't remember whether it was further east or west to my house, but it wasn't too far.

Q. All right.

A. Like I said, I –

[p. 97] Q. Was it close to the –

A. – never paid that much attention.

Q. – Atlantic County border; do you know?

A. I don't know where the Atlantic County border is.

Q. Well, it's about a hundred yards from the house that you shot up. Does that refresh your recollection?

A. Yeah, but I don't know where it was in relation to that spot.

Q. Okay. Was it east or west of that spot; do you know?

A. I don't remember.

Q. All right. So your testimony under oath is that the family's home that you shot at just happened to be black and you had no idea at the time that they were black; correct?

A. That's correct.

Q. Okay. Sir, you've also testified that you took all kinds of drugs on the 21st and the 22nd; is that correct?

A. Yes.

Q. Did you ever tell Detective D'Augostine on December 22nd of 1994 that you took some medication because you had an upset stomach and bought the medication over the counter?

A. No, sir, I did not say that.

Q. So you didn't say that at all?

A. No, sir, never.

Q. Did you discuss your drinking with Detective D'Augostine on the morning of December 22nd, 1994?

[p. 98] A. Yes.

Q. Did you tell him that between 12:30 and 3:30 p.m. you had two drinks at the Windjammer?

A. I said three or four. I didn't say two.

Q. Okay. And did you tell him that on December 21 you went over to the Greek Island between 10:30 and 12 midnight – 10:30 p.m., that is – and had two drinks?

A. I didn't say two drinks.

Q. What did you say?

A. Three or – the same thing, about three or four, something like that.

Q. Okay. And what time did you tell him you left the Greek Island?

A. I was never asked that question. I didn't tell him any time.

Q. So you told him what time you left the Windjammer, but you didn't tell him what time you left the Greek Island?

A. Yes.

Q. Okay. And he didn't even ask? He wasn't – he didn't ask you?

A. I think I said something like a little while ago or something like that, but I didn't say any specific times, any reference to the time.

Q. Okay. So Detective D'Augostine made sure that he got the times about the Windjammer, but he didn't get the times [p. 99] about the Greek Island?

A. Well, I –

MR. O'NEILL: Objection.

THE WITNESS: – told –

MR. O'NEILL: Objection. He can't be asked –

THE WITNESS: It's ridiculous.

MR. O'NEILL: – what was in the mind of Detective D'Augogtine.

THE COURT: Sustained.

MR. LUTHER: I'll rephrase it, Judge.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Detective D'Augostine specifically asked you about the times you were at the Windjammer and you told him; correct?

A. I don't think it was a question directed by Detective D'Augostine. I just volunteered the information.

Q. But at some point if it wasn't Detective D'Augostine it was another Vineland Police officer. They asked you what times you were at the Windjammer on December 21, 1994; correct?

A. I never spoke to any other police officer, except for Detective D'Augostine.

Q. Sir, the previous answer you said it wasn't Detective D.'Augostine that you said that to. Who were you speaking with other than Detective D'Augostine?

MR. O'NEILL: Objection. He said he volunteered it. He said he didn't respond to a question.

[p. 100] THE COURT: All right. The question now is: Was there another police officer that you spoke to besides Detective D'Augostine?

THE WITNESS: Not more than like a couple words or something. I remember another officer saying that my trunk (sic) – I mean, my hood was warm, something like that. But I was – I was never asked any questions by any other police officer, except for Detective D'Augostine.

CROSS-EXAMINATION BY MR. LUTHER:

Q. And your testimony under oath today is that he mentioned homosexuals in jail and AIDS?

A. Yes, sir.

Q. And that he also told you that a large percentage of the prison is black; correct?

A. Yes.

Q. Okay. And that after he told you a large percentage of the prison is black, you then admitted that you did this crime because you wanted to scare the black people out of the neighborhood; is that correct?

A. Well, he added something else to that. He said that – he said that he did not – oh, I can't remember it now. He said he did not want to send me to jail. He wanted to get help for me. And if I cooperated with him and made his job easier, he would get help for me.

Q. How come you didn't remember that on direct exam, [p. 101] sir?

A. Excuse me?

Q. How come you could not recall that part of your testimony on direct exam?

MR. O'NEILL: Objection. He wasn't asked that question.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Isn't it true that you didn't mention that during your direct testimony, sir?

A. What direct? I don't understand. Direct.

Q. When Mr. – okay. When Mr. –

A. Direct?

Q. – O'Neill asked you questions you didn't mention that Detective D'Augostine told you he wanted to get you help; is that correct?

MR. O'NEILL: Objection, again. I didn't ask him that question.

MR. LUTHER: That's not my question.

My question, Judge, is whether or not he mentioned that during his direct.

THE COURT: Do you recall when Mr. –

Sit down, Mr. O'Neill.

When Mr. O'Neill was asking you the questions, do you recall whether or not you said anything about Detective [p. 102] D'Augostine wanting to get you help?

THE WITNESS: No, I forgot it.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Didn't you think that that was important, sir?

A. Yeah, I was – I had – I was trying –

Q. Sir, –

A. – to remember it. I knew I left something out, –

Q. – sir, –

A. – but this – it just now occurred to me.

Q. Okay. Are you aware that the State is moving for an extended term of imprisonment in this case?

A. Yes.

Q. And that the basis of that motion is that you acted with racial bias?

A. Yes.

Q. Didn't you think it was important to remember these threats that were made to you by the detective?

A. Yes, I knew it was important.

Q. But now you recall on cross-exam that those threats were made?

A. Just this second.

Q. Okay.

A. Just this second that I –

Q. Okay.

A. – left that out. It just came to me.

[p. 103] Q. All right. Anything else just come to you about what Detective D'Augostine said in the last few seconds?

A. Oh, I'm sure there was a lot of things he said in that – the four hours of interrogation, but nothing – nothing is as serious, I guess, or as pertinent to the case as the time that he threatened me.

Oh, he also – you know what? I did remember something. He told me –

Q. Oh, it's coming back?

A. What's that? Yeah.

Q. It's coming back now?

A. Yeah, –

Q. Good.

A. – he told me was going to take my silencer and stick it up my ass.

Q. Oh, I see. And, again, you agree that that was not on your direct exam?

A. Yes.

Q. Okay.

A. I'm a – I'm a little – very anxious and nervous. And I'm not thinking a hundred percent right now.

Q. Okay. Sir, did you tell Detective D'Augostine on December 22nd of 1994 that you were not under the influence of any alcohol or anything, and was only tired and requested some coffee, which was then given to you?

[p. 104] A. No.

Q. You never said that?

A. I said the – the coffee. Yes, I said the coffee. But I'm answering no to the entire question.

Q. Did you ever tell him that you were not under the influence of alcohol?

A. No.

Q. Did you ever tell him you were not under the influence of drugs?

A. No. That's the part I'm saying no to.

Q. Okay. Sir, you admitted in your direct examination that you didn't think the State would be able to use any of what you told Detective D'Augostine against you; isn't that true?

A. I was under that impression, yes.

Q. And you've learned now that that's not correct; isn't that true?

A. Yes.

Q. Sir, you also had two bombs in the house?

MR. O'NEILL: I object. This is far afield from where we're going for the purpose of this hearing, Judge.

THE COURT: Well, I'll see where it's going.

The objection's overruled.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, what were you going to do with those bombs?

[p. 105] A. I was just going to blow them up my field. That's what I told Detective D'Augostine.

Q. And –

A. Again, it was a mechanical process. I wanted to see if – if I could do – if I could (tape malfunction) them, that's all. It was never meant to hurt anybody with them.

Q. I see. And you put silencers on guns so you don't spook horses; correct?

A. Yeah.

Q. Now, sir, –

A. Well, yeah.

Q. Okay.

A. Yes, that's correct.

Q. Sir, let me see if I can understand this. Could you explain to this Court again why did you fire at the Fowlkes residence on two occasions in 1994?

A. I only remember one occasion. That was because of the door and the glass panel in the door.

Q. Okay. Sir, when you told Judge Ridgway under oath that you fired at the home on two occasions were you lying?

A. I just looked at the – at the evidence and figured I couldn't do any better, so I – 'cause I didn't remember specifically I said that – I agreed with the two incidents.

Q. So, in other words, you lied?

A. I thought I had no choice.

[p. 106] Q. So you lied under oath to Judge Ridgway when you told him that you fired at the home on two occasions?

MR. O'NEILL: Objection. That's not at all what he said, Judge.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, you remember firing at the home on December 22nd of 1994; is that correct?

A. Yes.

Q. Okay. And to help you remember is the fact that the police were at your home 15 of 20 minutes later; correct? Did that aid you in your recall?

A. Well, the exact timeframe I'm not sure. It was something like that, though.

Q. Okay. And are you telling us today under oath that you don't remember firing at the Fowlkes residence at any other time in 1994?

A. That's correct.

Q. Okay. When you told Judge Ridgway under oath back in July that you had fired at the Fowlkes residence on two occasions was that the truth?

A. Could you repeat that?

Q. All right. When you told Judge Ridgway under oath in July of this year that you had fired at the Fowlkes residence on two different occasions was that the truth?

[p. 107] A. Did I – did I tell him, is that what you're saying, under oath?

Q. Sir, we know that you did tell Judge Ridgway that under oath; –

A. Yeah.

Q. – okay? Do you remember pleading guilty?

A. Yes.

Q. Okay; that was back on July 24th of this year; correct, sir?

A. Yes.

Q. All right. Did you tell Judge Ridgway that you fired at the Fowlkes residence on two separate occasions in 1994?

A. Well, that was part of the plea agreement.

Q. Do you understand my question, sir?

A. No.

Q. All right. My question is very simple. I just want to know if when you pled guilty you told Judge Ridgway that you fired at the Fowlkes residence on two separate occasions in 1994. Is that what you told Judge Ridgway under oath?

MR. O'NEILL: Judge, I'm going to object, because this is not a test of his credibility. The record speaks for itself. The man admitted on two occasions committing the crimes of unlawful use of a weapon for an unlawful purpose. Now, if he says, as he's already testified, that he didn't remember shooting on a previous occasion but pleaded guilty [p. 108] because that's what the evidence showed, it's not a credibility question. And for that reason the question raised by the Prosecutor's objectionable.

THE COURT: Overruled.

MR. LUTHER: Judge, it goes directly to credibility.

THE COURT: Overruled. Overruled.

Ask the question and let the witness answer it.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, I'll ask you again. Did you tell Judge Ridgway when you pled guilty that you fired at the Fowlkes residence on two separate occasions in 1994?

A. Yes.

Q. Was that the truth?

A. That I did – that I did definitely –

Q. Yes or no, sir.

A. – do the two –

Q. Was that the truth?

A. I was going from the evidence.

Q. Yes or no, sir, was that the truth?

A. No.

Q. So you lied under oath to Judge Ridgway, but today you're telling us the truth?

THE COURT: Just wait a minute, Mr. Luther.

Do you have an answer to that question? Are you admitting that you lied under oath in July?

[p. 109] THE WITNESS: Can I explain it, Your Honor?

THE COURT: Well, why don't you answer the question, if you can, yes or no. And then you can explain it.

Did you lie under oath?

THE WITNESS: That I definitely did it, yes.

THE COURT: All right. Now explain to me what happened.

THE WITNESS: I – it was a really – a quick thing. I only had a few minutes before – on July 24th. I didn't know what the plea – what the final part of the plea bargain was. I wasn't given time to think about it. I was afraid because I was told that I could have been subjected to a-hundred – I think it was a-hundred-and-twenty years in prison, and eight – eight-hundred-and-some thousand dollars worth of fines. And I – I was under the impression that this – the other shooting was being – it was still under negotiation for the last couple months. And I was scared and I didn't want to put my family through a – through a trial. So I agreed to the plea bargain.

THE COURT: So for all of those reasons when you said that you fired twice it was not the truth?

THE WITNESS: Two separate occasions?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: All right, Mr. Luther, go ahead.

MR. LUTHER: Thank you, Judge.

[p. 110] CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, isn't it true that you were arrested on December 22 of 1994 –

A. Yes.

Q. – and charged with four different shootings; correct?

A. Yes.

MR. O'NEILL: Objection. Those other shootings are irrelevant to this procedure, Judge.

MR. LUTHER: Judge, I'm going to his memory, to his recall, to his credibility. The Court certainly –

THE COURT: At this point it's –

MR. O'NEILL: It's irrelevant, Judge.

THE COURT: – overruled. The objection's overruled

Go ahead.

MR. LUTHER: Thank you.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Sir, you were given those charges dealing with the four different shootings on December 22 of 1994; were you not?

A. Four different –

Q. Four separate –

A. – dates, you mean?

Q. Yeah, you were charged with –

A. Or shooting a number of shots?

Q. – you were charged with shooting at the Fowlkes residence on four separate dates.

[p. 111] A. Yes.

Q. Do you remember that?

A. Yes.

Q. And you were given what's called the green sheet, your copy of the complaint, on those dates; correct?

A. Yes.

Q. Okay. So you knew back in December of 1994 that you were being charged with four separate shootings of the Fowlkes residence?

THE COURT: When you say "four separate," you mean shootings on four –

THE WITNESS: The four occasions.

THE COURT: – separate occasions?

MR. LUTHER: Yes. Yes, Judge.

THE WITNESS: Yes, I did.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Okay. And that those four separate occasions meant four different dates; correct?

A. Yes.

Q. Now, the plea offer that was made in this case, sir, you were always aware that the State (sic) – the plea offer required you to admit to two separate shootings; is that correct, sir?

A. Yes.

Q. And you were aware of that early in 1995; were you [p. 112] not?

A. Not the plea bargain.

Q. Well, the terms of the plea agreement which were extended to you, you knew what they were certainly long before July 24th of 1994; didn't you?

A. I knew what the preliminary plea bargain was about two months before July 24th.

Q. So you knew at least two months before you pled guilty that the State wanted you to admit to two of the four charged shootings; correct?

A. Yes.

Q. So you knew for that at least two-month period that that was the plea offer; correct?

A. I was under the impression that the other shooting was being negotiated.

Q. But you did know that the State wanted you to admit to two separate shootings?

A. Yes.

Q. Okay. Sir, since you admit you lied to Judge Ridgway on July 24, how do we know if you're not lying today?

A. 'Cause I'm not.

Q. So we're supposed to just rely on your word then, sir?

A. What else can I tell you? What else can I do?

Q. Well, sir, you've admitted committing perjury;

C. Apprendi, Jr. – Redirect

[p. 113] correct?

A. I just never –

MR. O'NEILL: He can't be asked –

A. – thought of it that way.

MR. O'NEILL: – a legal definition, Judge. He's not competent to answer that.

THE COURT: I don't know what more the witness can add, Mr. Luther, other than (indiscernible – voice too low).

MR. LUTHER: I have nothing further, Judge.

THE COURT: All right.

MR. O'NEILL: Well, I just have one question, Judge.

THE COURT: Go ahead.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Charles, in reference to the September shooting, is it your testimony that you don't remember doing the shooting, or are you testifying that you lied to the Court and said you did it and you really didn't? Which is it?

A. I'm basing it on the same thing. I don't remember doing any other shooting.

MR. O'NEILL: No further questions.

RECROSS-EXAMINATION BY MR. LUTHER:

Q. So you could have done three prior shootings? You just don't remember?

MR. O'NEILL: Objection.

THE COURT: Sustained.

D. D'Augostine – Direct

[p. 114] MR. O'NEILL: It's not before the Court.

THE COURT: Sustained.

Anything else, Mr. Luther?

MR. LUTHER: No, Your Honor.

THE COURT: All right. You may step down.

THE WITNESS: Thank you.

THE COURT: Any other witnesses?

MR. O'NEILL: No, sir.

THE COURT: Any rebuttal witnesses?

MR. LUTHER: Yes, Your Honor. The State calls Dennis D'Augostine.

THE COURT: Is he still available?

MR. LUTHER: Yeah.

THE COURT: Come up here, Officer. You're still under oath.

Go ahead, Mr. Luther.

(Whereupon Det/Sgt. Dennis D'Augostine was reexamined, as follows:)

DET/SGT. DENNIS D'AUGOSTINE, WITNESS, SWORN
DIRECT EXAMINATION BY MR. LUTHER:

Q. Good morning (sic) – sir – or good afternoon, sir. Could you tell the Judge your name, please?

A. Dennis D'Augostine. I'm with the Vineland Police Department.

Q. And in what capacity?

[p. 115] A. I'm a detective/sergeant.

Q. And how long have you been so employed?

A. 26 years.

Q. Okay. And were you so employed on December 22 of 1994?

A. Yes, sir.

Q. And on that date did you have occasion to speak with a Charles Apprendi, Junior?

A. That's correct.

Q. And prior to speaking with him did you read him his *Miranda* rights?

A. Yes, I did.

Q. Did you ascertain that he under – strike that.

Did he indicate that he understood his *Miranda* warnings?

A. Yes, he indicated he clearly understood them. And he waived his *Miranda* warnings and he was – and wished to talk to us.

Q. Okay. And where – what time was the *Miranda* warning given to him at the Vineland Police Department?

A. Approximately 6:04 a.m.

Q. And that was December 22, 1994?

A. That's correct.

Q. And did you ask Mr. Apprendi, Junior, how much alcohol he had consumed on December 21 and December 22 of 1994?

[p. 116] A. Yes, I did.

Q. And what did he tell you?

A. He indicated he had two drinks at the Windjammer sometime in the afternoon. And from there he went over to the Greek Island around 10:30 and he had two more drinks. He also said he had some medications.

Q. Okay. Did he indicate approximately what time he left the Windjammer?

A. At approximately –

Q. I'm sorry. Strike that.

Did he indicate what time he left the Greek Island?

A. Yes, around 12 midnight.

Q. And did he indicate when he was at the Windjammer earlier that day?

A. Yeah, he told me between 12:30 p.m. and approximately 3:30 p.m.

Q. All right; okay. Did he indicate whether or not he knew that black people lived at the residence that he fired at?

A. Yes, he did.

MR. O'NEILL: Well, I'm going to object, Judge. I notice that the Detective/Sergeant is reading from his report. No foundation has been laid.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, do you need to refer to your report to refresh your recollection?

[p. 117] A. Yes, I do.

MR. O'NEILL: As to which question?

MR. LUTHER: Well, how about if I ask the question? And if he needs to refer to his report he can.

MR. O'NEILL: Well, that's why I objected.

THE COURT: Generally, do you need to refer to your report to refresh your recollection in your testimony – for your testimony?

THE WITNESS: For specific times I would, Your Honor.

THE COURT: All right. Go ahead. Let's see where we're going.

MR. LUTHER: Okay.

DIRECT EXAMINATION BY MR. LUTHER:

Q. Sir, did Mr. Apprendi, Junior, indicate to you whether or not he knew that black people lived at the residence that he shot at?

A. Yes, he did.

Q. And what did he tell you in that regard?

A. He told me that he knew that black people lived there. And I asked him, "How did you know?" And he – he told me he'd seen a black person outside in the yard.

Q. Okay. During the time that you spoke with Mr. Apprendi that morning at the Vineland Police Department, did he make any statement to you whether or not he was under the influence of any alcohol?

[p. 118] A. Yes, he did.

Q. What did he tell you?

A. He told me he wasn't under the influence of any alcohol or anything, he said.

Q. Okay. Do you have any experience recognizing people who are intoxicated?

A. Yes, I do.

Q. And where is that from?

A. I was in Patrol Division for approximately 12 years.

Q. Okay.

A. And I –

Q. Did Mr. Apprendi appear to be intoxicated to you, sir?

A. No, I didn't smell any alcohol on his breath. His eyes weren't bloodshot. No alcohol on his person. He didn't sway. And he answered my questions clearly.

Q. Okay. Do you have any experience in recognizing whether or not people are under the influence of narcotics?

A. Yes, I do.

Q. And could you tell the Court about that?

A. I've been involved with narcotics. I've been involved with hundreds of cases of narcotic investigations. I was a supervisor of the Cumberland County Narcotics Unit. And I – I attended drug enforcement administration schools, workshops and seminars throughout my career.

[p. 119] Q. Okay.

A. And I can recognize if someone's under the influence. And I would – he was not under the influence of any drugs.

Q. All right.

A. He indicated he was on medication, but he told me what that was.

Q. Did he indicate where he obtained this medication?

A. He may have said – he said he purchased it over the counter and it was for his upset stomach.

Q. All right. Did he tell you what the name of that medication was or no?

A. I'd have to refresh. I don't believe he did, –

Q. All right.

A. – but I'm not sure.

Q. Did he ever tell you when you spoke with him that morning that that date or on the 21st of December he had taken Lomotil?

A. He may have. I don't – I don't remember.

Q. Okay. Would that have been with reference to the stomach medication?

A. Yes.

Q. All right. Did he – is it possible he told you what the name of the stomach medication was?

MR. O'NEILL: Objection. If it's "possible." He either did or he didn't.

[p. 120] THE COURT: Well, it's not Lomotil. He doesn't remember if it was Lomotil.

Do you remember if he – he told you the name –

THE WITNESS: I –

THE COURT: – of the drug?

THE WITNESS: – I don't – he may have, but I don't know –

THE COURT: All right.

THE WITNESS: – at this point.

THE COURT: You don't remember?

MR. LUTHER: All right.

THE WITNESS: I don't remember.

DIRECT EXAMINATION BY MR. LUTHER:

Q. All right. Detective, when you spoke with Mr. Apprendi did you tell him that there were lots of homosexuals in jail?

A. No, sir.

Q. Did you tell him that a lot of people in jail have AIDS?

A. No, sir.

Q. Did you tell him that a large percentage of the prison is black?

A. No, sir.

Q. Did you tell him that if he cooperated that you would make it easier on him?

[p. 121] A. No, sir.

Q. Did you tell him that you didn't want to see him go to jail, that you just wanted to get him help?

A. No, sir.

Q. And did you tell him that you wanted to take that silencer and shove it up his ass?

A. No, sir.

Q. Sir, where was the interview conducted at the Vineland Police Department with yourself and Mr. Apprendi, Junior?

A. It was the first interview room, which is adjacent to the detective bureau.

Q. And who was in that room with you and Mr. Apprendi, Junior?

A. Officer John Rizzo and myself and Mr. Apprendi.

Q. Okay. And, incidentally, do you see Mr. Apprendi in court today?

A. Yeah, he's sitting next – seated next to Attorney Joe O'Neill, to his right.

Q. Okay.

THE COURT: The record will reflect that he's identified the defendant.

DIRECT EXAMINATION BY MR. LUTHER:

Q. And when you were speaking with him did he seem coherent to you?

[p. 122] A. Yes, he answered clearly. And he – he wasn't under the influence of anything. He answered our questions clearly. And he was responsive to our – our questions.

Q. Were you able to ascertain what his educational background was during the interview?

A. Yes, he – he told me he was a pharmacist at Winslow's Drugstore in Vineland, West and Chestnut Avenue. And I believe he was a pharmacist for approximately ten years or more.

Q. Okay. During the course of the interview with Mr. Apprendi, Junior, did you mention to him that there

were a total of four shootings, four different shootings, on the Fowlkes residence?

A. Yes, I did.

MR. O'NEILL: It's irrelevant, Judge.

THE WITNESS: Huh.

THE COURT: Overruled.

MR. LUTHER: Thank you, Judge.

THE WITNESS: Yes, I did.

DIRECT EXAMINATION BY MR. LUTHER:

Q. And during the course of your interview how many shootings at that residence did Mr. Apprendi admit to?

MR. O'NEILL: Objectionable, Judge. That's not the purpose of this hearing. There's only been a plea of guilty to two. There's no reason to prove that again.

THE COURT: Well, let's ask him.

D. D'Augostine – Cross

[p. 123] Let me ask you this: Did he admit to you that he fired on more than one occasion at the Fowlkes residence?

THE WITNESS: Yes, Your Honor.

DIRECT EXAMINATION BY MR. LUTHER:

Q. How many occasions did he admit to you that he fired at the Fowlkes residence?

A. Two incidents.

Q. Two separate instances?

A. Two separate incidents.

Q. All right. And when did the interview with Mr. Apprendi terminate?

A. At some point during the interview he asked for an attorney. And when he did all questioning ceased.

Q. Okay. And is that the reason no taped statement was taken from Mr. Apprendi?

A. Yes, that's the reason.

Q. And your understanding of the law is that once someone requests an attorney all interrogation must cease; correct?

A. Yes, sir.

Q. All right.

MR. LUTHER: Nothing further, Judge.

THE COURT: Cross-examine.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Sergeant, before this defendant was arrested on [p. 124] December 22 of 1994, Ms. Fowlkes, who lived in the house that was shot up, had voiced her opinion publicly that the shootings previous to the one of December 22 had been racially motivated; isn't that right?

A. I – I don't know that to be true. I –

Q. Well, if I told you that a report from one of your men dated November 14 of 1994 reveals that back on

November 10th of 1994, again before the date of the arrest, that Mattie Fowlkes stated her opinion that previous shootings at her house were racially motivated, would you agree or would –

THE COURT: Wait –

MR. O'NEILL: – you try to contradict that?

THE COURT: – a minute. Now, wait a minute, Mr. O'Neill. He said he didn't know that she had made – as I understand it –

THE WITNESS: Well, I don't know that.

THE COURT: – he didn't know –

MR. O'NEILL: Well, –

THE COURT: – if she had made such a complaint. Now you're asking him if it's in some other police officer's report?

MR. O'NEILL: Let me ask it another way then, Judge. I'll see if we can get at it a different way.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. As a sergeant you are a supervising officer; are you [p. 125] not?

A. Yes.

Q. Okay. There came a time when you reviewed all of the reports in this particular case; isn't that so?

A. Yes, sir.

Q. Including those of your other officers, as well as your own; right?

A. Yes, sir.

Q. Okay.

MR. O'NEILL: Now, may I have this marked as what would amount (sic) to D-2?

MR. LUTHER: Judge, I'm going to object. The foundation has to be laid whether or not the officer reviewed the report prior to December 22, 1994.

MR. O'NEILL: Well, –

THE COURT: Well, why don't you ask him that question, first of all?

MR. O'NEILL: All right.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Do you remember when you first reviewed all of the reports concerning this case? You probably don't know what date, I guess; do you?

A. That would be that same day, probably, I reviewed it.

Q. Which same day?

A. December 22nd –

[p. 126] Q. Okay.

A. – or December 23rd.

Q. And as part of that review did you have occasion to look into a report dated November 14 to your own police department?

MR. O'NEILL: Can I show it to you?

THE WITNESS: Can you tell me the officer's name?

THE COURT: You want to have it marked? What is it, D-1?

MR. O'NEILL: D-2, because I think D-1 is the CV of Dr. Cooke.

THE COURT: Okay.

MR. O'NEILL: The only one (indiscernible – voice too low). Let's mark that, Judge. That CV I asked to be marked as an exhibit earlier.

THE COURT: So (indiscernible – voice too low) was not attached to the submissions you made to the Court? Did you submit the second one before (indiscernible – voice too low).

MR. O'NEILL: No, just the CV, Judge. I said that that should be marked and you agreed.

THE COURT: All right.

MR. O'NEILL: So if we could mark that as D-1 (indiscernible – voice too low).

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Let me show you what has been marked as Defense [p. 127] Exhibit D-2 for identification, and ask you to look at it. That report is dated what?

A. November 14, '94.

Q. Okay. Can you read the name of the officer who made the report?

A. Detective Valentine.

Q. Okay.

MR. LUTHER: Judge, I'm going to ask the witness to – or object based on the fact that there's still no foundation as to whether or not this detective reviewed that prior or after speaking with Mr. Apprendi.

MR. O'NEILL: I don't know that it's relevant as to when he reviewed it, as long as at some point in time he reviewed it, Judge.

THE COURT: It makes a lot of difference, because the thrust of your (sic) position is – or your client's position is that Detective D'Augostine first mentioned to him the fact that the house that he shot at was occupied by black people. The detective has stated, as I understand it, that he didn't know that, or at least it was not the subject matter of a report by Ms. Fowlkes that he knew about before the time that he started questioning Mr. D'Augostine (sic) – or questioning Mr. Apprendi. Now, –

MR. O'NEILL: Oh, no, I didn't say that, Judge. I didn't say that he had to know that before he questioned Mr. [p. 128] Apprendi. My position is that at some point in time there was a revelation by Ms. Fowlkes that she believed that the prior shootings were racially motivated. Not the one on December 22, because we didn't know about that. This statement was taken by the officer, Detective Valentine, on the 14th of November.

MR. LUTHER: Your Honor, the witness has already answered he was unaware of those statements.

MR. O'NEILL: Well, no, the witness already answered that at some point in time he did review all of the reports. Not only his own, but also those of his men.

THE COURT: Well, the issue is when in time did he review the reports, before or after he started questioning Mr. Apprendi?

MR. O'NEILL: Well, let me try it a different way, Judge.

THE COURT: Well, let's just ask him.

As the supervising officer, you're responsible – whether you do it or don't – but you're responsible for reviewing the reports of your subordinate officers; are you not?

THE WITNESS: Well, I – it could be another supervisor also reviewing them. But to answer your question, Your Honor, it was after.

THE COURT: It was – what was after?

THE WITNESS: The – I – reading the reports was [p. 129] after the reports were done. And it was after the interview with –

THE COURT: With Mr. Apprendi?

THE WITNESS: – Mr. Apprendi.

THE COURT: Well, that makes sense chronologically –

THE WITNESS: Yes.

THE COURT: – as to when it would have taken place; right?

THE WITNESS: Yes. In this case I didn't review that – I mean, I read that report, but I didn't review it. It was Sergeant Codispoti.

THE COURT: All right.

MR. O'NEILL: Let me ask –

THE COURT: And when you read it, it would have been after your discussion or after your interview with Mr. Apprendi?

THE WITNESS: That's correct, Your Honor.

THE COURT: Doesn't that make sense, Mr. O'Neill?

MR. O'NEILL: Well, I'm not done yet, Judge. There's another place we have to go yet, if I may.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. The report –

THE COURT: Be my guest.

MR. O'NEILL: Pardon, Judge?

THE COURT: Be my guest.

[p. 130] MR. O'NEILL: Thank you, sir.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. The report from which you testified is dated what?

A. 12/23/94.

Q. That's the day after the arrest; isn't it?

A. Yes, sir.

Q. All right. Now, you testified earlier, Sergeant, that at some point in time you read all of the reports. Not only those that you made, but those of your men, as well; is that right? You said that earlier in response to my question.

A. Yeah, at some point in time I read all the reports, –

Q. Okay.

A. – yes.

Q. So you can't state when it was that you read any of the other reports, I guess; can you? It would be asking too much.

A. No, I know it was after the investigation. And then, of course, for court preparation I read them.

Q. Okay. But you can't say what date it was –

A. No.

Q. – that you read these other –

A. No.

Q. – reports? Okay.

Do you remember reading the report of Detective Valentine as to what Ms. Fowlkes told him about the racial [p. 131] motivation involved in the previous shootings?

A. I remember something was mentioned, yes.

Q. All right. So before this defendant was charged with racially-motivated crimes – not necessarily you, but

at least some people in the Vineland Police Department – knew that there was an allegation by Ms. Fowlkes before the date of this arrest that the previous shootings were racially motivated; isn't that so?

A. Well, I – I wouldn't have known that.

Q. Well, I didn't ask you that. What I asked you simply was this. Maybe I can say it in a different way.

A. According to the reports, yes.

Q. Okay.

A. According to Valentine's reports.

Q. All right. Did you ask or one of your men ask Ms. Fowlkes whether there are other blacks in the neighborhood besides her family?

A. I don't know that.

Q. Did you ask her that?

A. No, sir. In fact, I never spoke to her.

Q. Did you ask one of your men to ask her that question, as to whether there are other blacks in the neighborhood than the Fowlkes family?

A. No, I did not.

Q. Looking back and recognizing it as hindsight – now, [p. 132] I'm not holding you to that – recognize (sic) it is hindsight, don't you agree it would be important to learn if there are other blacks in the neighborhood? And if there were, whether they were the subject of shooting attacks?

MR. LUTHER: Argumentative, Your Honor.

THE COURT: Sustained.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Did Ms. Fowlkes tell you or any of your men that she, Ms. Fowlkes, worked in a Vineland State School house in the neighborhood of where the shooting occurred where she lived?

A. She may have. I don't know that.

Q. All right. And there was no, to your knowledge, investigation conducted to determine if this was the only – these are the only black people in the neighborhood; is that right?

MR. LUTHER: Judge, objection. He's way beyond the scope of the direct examination. He's –

MR. O'NEILL: Well, the whole purpose is racial –

THE COURT: I'll –

MR. O'NEILL: – bias here.

THE COURT: – overrule the objection.

Go ahead.

MR. O'NEILL: All right.

CROSS-EXAMINATION BY MR. O'NEILL:

Q. Do you remember the question, sir?

[p. 133] A. This – this investigation was over a period of three – three or four months. And during that

period of time I had no involvement with this incident, except for on December 22nd. As to what the patrol officers did during that time period, I can only testify to the reports. I – I wasn't supervising the case from the – from the beginning.

Q. You didn't know about the previous investigation until after you at some –

A. Until I was –

Q. – time read the reports?

A. – until I was called in –

Q. Okay.

A. – on December 22nd.

Q. Very well, sir.

A. Okay.

MR. O'NEILL: I have no further questions. Thank you, Judge.

THE COURT: Mr. Luther, any redirect?

MR. LUTHER: Just briefly, Judge.

REDIRECT EXAMINATION BY MR. LUTHER:

Q. Detective, did you charge this defendant with racial bias harassment after you interviewed him?

A. Yes, sir.

Q. And did he tell you that the reasons for this crime were racially motivated?

[p. 134] A. Yes.

MR. O'NEILL: It's asked and answered, Judge. Been over that –

THE COURT: Sustained.

MR. O'NEILL: – on direct.

MR. LUTHER: Judge, it just goes to why – well, –

THE COURT: It's been asked and answered a number of times.

MR. LUTHER: All right. Nothing further, Judge.

THE COURT: You may step down. Thank you.

Any other witnesses?

MR. LUTHER: Not at this time. I'd like to call the Fowlkes at the sentencing date.

THE COURT: Anything else at this time, Mr. O'Neill?

MR. O'NEILL: No, Judge.

THE COURT: Okay; all right. We'll adjourn these proceedings until the – 10 o'clock on the 15th.

MR. LUTHER: 10 o'clock, Judge?

THE COURT: 10 o'clock on the 15th.

MR. LUTHER: Thank you.

(Whereupon the hearing concluded at this time)

CERTIFICATION

I, CAROL H. VENDZULES, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Superior Court on September 5, 1995, Tape No. 17077(1), Index No. from 2650 to 7370, Tape No. 17077(2), Index No. from 0000 to 6741, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings according to the best of my ability and knowledge.

Signature /s/ Carol H. Vendzules
CAROL H. VENDZULES
CERTIFIED DIRECTOR/
TRANSCRIBER OF THE STATE
OF NEW JERSEY, AOC #268
THE TYPE-RIGHT-ER

DATED: 1/3/96

Supreme Court, U.S.
FILED
OCT 20 1999
OFFICE OF THE CLERK

No. 99-478

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

JOHN J. FARMER, JR.
Attorney General of New Jersey
LISA SARNOFF GOCHMAN
Deputy Attorney General
Attorney of Record
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
P.O. Box 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

October 20, 1999

QUESTION PRESENTED

Whether existing United States Supreme Court precedent firmly supports the conclusion reached by the Supreme Court of New Jersey that the extended term sentencing provision of the Hate Crime Statute, *N.J.Stat.Ann.* 2C:44-3e (West 1995), preserves a defendant's federal constitutional rights to due process of law, notice by indictment and trial by jury?

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OPINIONS BELOW

Respondent (hereinafter the State) concurs with the statements set forth in the petition.

JURISDICTION

The State concurs with the statement set forth in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State concurs with the statements set forth in the petition.

STATEMENT OF THE CASE

In the early morning hours of December 22, 1994, petitioner Charles Apprendi, Jr., a white pharmacist, fired several rounds from a loaded rifle into a nearby single-family house, using as targets two black Santa Claus decorations hanging on the front door. The residents, Michael and Mattie Fowlkes and their three children, ages 9, 13 and 16, were the only black family living in petitioner's otherwise all-white neighborhood in Vineland, New Jersey. (Pa2-3, 100-02, 107-09).[1]

Petitioner was charged by the Cumberland County, New Jersey, Grand Jury in a twenty-three count indictment with four counts of attempted murder in the first degree, four counts of aggravated assault in the second degree, four counts of possession of a firearm for an unlawful purpose in the second degree, four counts of unlawful possession of a loaded

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[1] "Pet." refers to the petition for *certiorari*;
"Pa" refers to the appendix to the petition for *certiorari*;
"T" refers to the plea transcript dated July 24, 1995.

rifle in the third degree, unlawful possession of an incendiary device in the third degree, unlawful possession of an anti-personnel bomb in the third degree, four counts of harassment in the fourth degree, and unlawful possession of a firearm silencer in the fourth degree. (Pa3).

On July 24, 1995, petitioner entered a guilty plea before the Honorable Rushton H. Ridgway, J.S.C., to counts three and eighteen of the indictment charging second degree possession of a firearm for an unlawful purpose, contrary to *N.J.Stat.Ann.* 2C:39-4a (West 1995), and count twenty-two charging third degree unlawful possession of an anti-personnel bomb, contrary to *N.J.Stat.Ann.* 2C:39-3a (West 1995). (T3-14 to 4-16, 5-18 to 23, 10-13 to 21). Petitioner admitted at the plea hearing that his unlawful purpose for shooting at the Fowlkes' house was to frighten or harass the family. (T22-4 to 29-18).

Through petitioner's guilty plea, the State satisfied its burden to prove beyond a reasonable doubt the four elements of possession of a weapon for an unlawful purpose under *N.J.Stat.Ann.* 2C:39-4a: one, that petitioner had a firearm; two, that petitioner possessed it; three, that petitioner's purpose or conscious objective was to use it against the person or property of another; and, four, that petitioner intended to use it in a manner that was proscribed by law. *State v. Harmon*, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

The prosecution timely served petitioner with notice that it was seeking an enhanced term of imprisonment on count eighteen pursuant to *N.J.Stat.Ann.* 2C:44-3e (West 1995), the extended term provision of New Jersey's "Hate Crime Statute." (T9-20 to 10-8; Pa166). Under this statute, the same criminal conduct may be more heavily punished if "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* Upon application of the prosecuting attorney,

an extended term must be imposed if the sentencing court "finds, by a preponderance of the evidence, the grounds in subsection e." *Id.* The ordinary sentencing range for a second degree crime is between five and ten years, *N.J.Stat.Ann.* 2C:43-6a(2) (West 1995). The extended sentencing range for a second degree crime is between ten and twenty years, *N.J.Stat.Ann.* 2C:43-7a(3) (West 1995), which is the ordinary sentencing range for a first degree crime. *N.J.Stat.Ann.* 2C:43-6a(1) (West 1995).

At the extended term sentencing hearing held before Judge Ridgway, Michael Fowlkes recalled that on December 22, 1994, he and his wife awoke at 1:55 a.m. to the sounds of gun shots and shattering glass. Eight bullets had been fired at their house, and the front French doors, which were panes of clear glass set in a burgundy frame, were riddled with bullets. (Pa107-09). One of the bullets lodged in the wall of their daughter's bedroom. (Pa109).

Petitioner was arrested shortly thereafter, and he admitted to Detective Dennis D'Augostine that he fired shots into the Fowlkes' home because the residents were black and he was "giving them a message" that they were unwelcome in petitioner's neighborhood. Petitioner knew that a black family lived there because he had seen them outside in the yard, but he did not know the victims personally. (Pa174-78, 299).[2]

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[2] Petitioner claims that "the police department had espoused the theory that the shooting of the house was racially motivated long before the petitioner was interrogated" (Pet. at 5) to support the notion that D'Augostine was "hunting for a racist motive for what [petitioner] did." (Pa241). D'Augostine was unaware until after he interviewed petitioner, however, of the statement of Mattie Fowlkes taken by a Detective Valentine on November 14, 1994, in which she expressed her belief that earlier shootings at her house were racially motivated. (Pa289-299).

Petitioner presented seven character witnesses at the hearing who testified that defendant did not have a reputation for racial bias against blacks. (Pa182-203).

Petitioner also presented the opinion of Doctor Gerald Cooke, a psychologist who examined petitioner at the Cumberland County Jail on February 15, 1995. (Pa204-07). According to Doctor Cooke, petitioner told him that he had consumed eight alcoholic beverages and some medication on December 22, 1994, and had "feelings that he wanted to destroy something" when the Fowlkes' purple door caught his attention. (Pa210-11). After firing at the Fowlkes' front door, petitioner returned home, hid the gun and went to sleep. (Pa211). The police arrived twenty minutes later and told him that if he cooperated "they would be less stringent." (Pa211-12). Doctor Cooke admitted that he had "no way of knowing" whether petitioner told him the truth during the interview. (Pa228).

Doctor Cooke ruled out the possibility that petitioner suffered from insanity or a diminished capacity. (Pa207-08). The doctor did find, however, a pattern of alcohol abuse and drug dependency. (Pa208-09). He concluded that petitioner had an obsessive-compulsive disorder, mood swings and an impulse disorder of kleptomania. (Pa216-18). The synergistic effect of the drugs and alcohol, combined with petitioner's "anxious and overcontrolled" personality, created "the kind of personality of an individual who would [tell a lie] to get out of this kind of situation." (Pa218-19). Doctor Cooke acknowledged that petitioner had never been treated for any psychiatric disorders or alcohol and drug abuse, and was in fact employed as a pharmacist at the time of the shootings. (Pa223).

Petitioner testified on his own behalf. He claimed that when the police came to his house at 3:00 a.m. of the morning of his arrest he was "extremely exhausted and depressed." Petitioner alleged that he had drank three or four vodka drinks

several hours before and had taken medication for his "irritable bowel syndrome," an "opiate" and a "minor tranquilizer." (Pa236-39). Petitioner denied being a racist and claimed that he admitted to a having a racial bias only because Detective D'Augostine was scaring him with stories of homosexuality and AIDS among the prison population. (Pa242-45).

On cross-examination, petitioner admitted that when the "glass and purple door ... caught [his] eye," he went home, retrieved his rifle and returned to the Fowlkes' residence. (Pa251-52). The rifle was equipped with a "red-dot" scope for accurate aim, as well as a silencer, which he characterized as "toys." (Pa252-53). Petitioner admitted that it would be in his best interest to tell Judge Ridgway that he is not a racist. (Pa255-56).

On rebuttal, Detective D'Augostine testified that petitioner "clearly understood" his *Miranda* rights. (Pa281). In response to the detective's question, petitioner stated that although he had consumed two alcoholic drinks in the late afternoon and two more at 10:30 p.m., he was not under the influence of any alcohol or drugs. (Pa283). Petitioner's breath bore no odor of alcohol, his eyes were not bloodshot, he did not sway and he answered the detective's questions clearly. (Pa284). Petitioner admitted that he fired at the Fowlkes' house on two separate occasions. (Pa288-89). The detective never threatened petitioner, nor did he promise leniency if he cooperated. (Pa286). The interview was immediately terminated when petitioner requested an attorney. (Pa289). Petitioner stipulated that his confession was given in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). (Pa172).

Judge Ridgway found Detective D'Augostine to be credible and "had difficulty believing that [petitioner] was attracted to [the Fowlkes' front] door by the color. And that something went off in his ... intoxicated state of mind that he

wanted to destroy the door." (Pa142-43). The judge recalled petitioner's admission under oath at the plea proceeding that his unlawful purpose in shooting at the Fowlkes' house was to scare the occupants. The court was satisfied that petitioner's act was motivated by racial bias and that petitioner was now denying any such prejudice so as to avoid the enhanced punishment for a bias crime. (Pa143-44). Judge Ridgway found that the State met its burden of proving by a preponderance of the evidence that petitioner's act was racially motivated and, therefore, petitioner was subject to an extended term of imprisonment. (Pa145). Petitioner was sentenced on count eighteen to an extended custodial term of twelve years with a mandatory period of parole ineligibility of four years. (Pa161).[3]

In a published opinion filed August 19, 1997, the Superior Court of New Jersey, Appellate Division, affirmed petitioner's convictions and sentences and declared *N.J.Stat.Ann.* 2C:44-3e constitutional. *State v. Apprendi*, 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997) (Pa81-94). The majority found that the statute did not make racial bias an essential element of the predicate crime. The statute was aimed at deciphering a defendant's motive, a traditional sentencing factor. The imposition of an extended term of imprisonment following a finding of bias by the sentencing court by a preponderance of the evidence standard did not

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3 The mandatory minimum term was not imposed pursuant to the Hate Crime Statute but was authorized by *N.J.Stat.Ann.* 2C:43-6c (West 1995), because defendant was convicted of possession of a firearm with intent to use it against the person of another. (Pa4).

On count three, petitioner was sentenced to an ordinary term of seven years imprisonment with a mandatory period of parole ineligibility of three years, to be served concurrently to the term imposed on count eighteen. On count twenty-two, petitioner was sentenced to an ordinary term of three years imprisonment, to be served concurrently to the terms imposed on counts three and eighteen. (Pa161).

violate the constitutional requirement that the State must prove each element of an offense by the reasonable doubt standard. (Pa86-94).

The concurring member of the panel agreed that *N.J.Stat.Ann.* 2C:44-3e was constitutional under the majority's analysis, adding that the sentencing enhancer of the Hate Crime Statute appears in the general sentencing provisions of New Jersey's Code of Criminal Justice and was adopted after the Code's provisions establishing the crimes. The concurring judge compared the Hate Crime Statute to New Jersey's Graves Act which mandates ineligibility terms on sentences where a judge finds by a preponderance of the evidence that a defendant used or possessed a firearm, notwithstanding that the offense for which he or she was convicted did not necessarily involve use or possession of a firearm as an element thereof. (Pa77-80).

The dissenting judge believed that the word "purpose" as used in the Hate Crime Statute was synonymous with "intent" and was thus an element of the predicate offense that had to be proven by the finder of fact beyond a reasonable doubt. (Pa68-76).

Petitioner filed with the Supreme Court of New Jersey an appeal as of right from the dissent in the Appellate Division pursuant to *N.J. Court Rule* 2:2-1(a)(2).

On June 24, 1999, the Supreme Court of New Jersey affirmed the Appellate Division opinion and determined that the Hate Crime Statute did not violate the United States Constitution. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999) (Pa1-28). Analyzing the Hate Crime Statute under relevant United States Supreme Court precedent, the court found that petitioner's biased motivation behind the shooting was a sentencing factor to be resolved by the sentencing judge, and not an element of the offense requiring a jury finding beyond a reasonable doubt:

> We find that the provision has been narrowly tailored to meet First Amendment concerns, and represents a legislative attempt to comply with a constitutional mandate, not a legislative attempt to circumvent due process rights to trial by jury.
>
> * * *
>
> [T]he Legislature simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the [*United States v.] Almendarez -Torres* analysis, is a very traditional sentencing factor.
>
> [Pa2, 22].

Two of the seven members of the court dissented, finding the statute violative of the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment of the United States Constitution. (Pa29-66).

REASONS FOR DENYING THE PETITION

In determining that petitioner's racial bias motivating his shooting of a loaded rifle at the Fowlkes' house was a sentencing factor subject to the "preponderance of the evidence" standard, and not an essential element of the underlying crime of possession of a weapon for an unlawful purpose requiring a jury finding of guilt beyond a reasonable doubt, the Supreme Court of New Jersey faithfully applied the constitutional calculus formulated by this Court in a series of decisions addressing the so-called "sentencing factor versus element" debate. The statutory scheme created by the extended term provision of New Jersey's Hate Crime Statute, *N.J.Stat.Ann.* 2C:44-3e (West 1995), punishes motive, not criminal intent, and thereby guarantees petitioner's Sixth

Amendment right to notice by indictment and trial by jury, and Fifth and Fourteenth Amendments right to due process of law. See *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999) (Pa1-28). This adherence to United States Supreme Court precedent means that the issue decided by the state court may implicate federal constitutional provisions, but ultimately fails to present "an important question of federal law that has not been, but should be settled by this Court," or "an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c).[4] Simply put, there are no "compelling reasons" for this Court to grant this petition for a writ of *certiorari*. Supreme Court Rule 10.

At the time petitioner entered his guilty plea to possession of a weapon for an unlawful purpose, *N.J.Stat.Ann.* 2C:39-4a (West 1995), the extended term provision of New Jersey's Hate Crime Statute required the sentencing court to impose an increased maximum term of imprisonment if, after a hearing, the State proved by a preponderance of the evidence that in committing the predicate offense the defendant acted "with a purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity." Petitioner confuses motive (the *sine qua non* of New Jersey's Hate Crime Statute) with criminal intent (the *sine qua non* of New Jersey's unlawful possession of a weapon statute) to claim that the Hate Crime Statute unconstitutionally allows the sentencing court to decide, by a preponderance of the evidence, a defendant's mental state under a statute which can increase the maximum sentence. (Pet. at 3).

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[4] Certainly, the final resolution of the federal constitutional question invoked by New Jersey's Hate Crime Statute does not conflict with any decision of any other state court of last resort or of a United States court of appeals. Supreme Court Rule 10(b).

Petitioner's argument that *N.J.Stat.Ann.* 2C:44-3e punishes criminal intent stems from the statute's reference to the accused's "purpose to intimidate." The *Apprendi* court, however, equated "purpose to intimidate" with "motive," (Pa22), and this Court is "bound by a state court's construction of a state statute." *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993). Motive has been recognized by this Court to be a traditional sentencing factor. *Id.* at 485; *see also State v. Mortimer*, 135 N.J. 517, 528, 641 A.2d 517, 528, *cert. denied*, 513 U.S. 970 (1994). Motive, not criminal intent, is what New Jersey's Hate Crime Statute punishes.

By petitioner's own admission at the plea hearing, his criminal intent or *mens rea*, that is, his unlawful purpose for shooting at the Fowlkes' house, was to frighten or harass the family asleep inside. (T22-4 to 29-18). Petitioner's reason for wanting to scare the family, that is, his motive, was to send the Fowlkes family "a message" that blacks were unwelcome in petitioner's neighborhood. (Pa174-78, 299). While the prosecution bore the burden to prove petitioner's criminal intent (his unlawful purpose) behind the shooting (his conduct), it had no burden to prove that his conduct was influenced by racial hatred (his motive). Motive is relevant to the issue of intent but is not an essential element of any crime in New Jersey, *State v. Beard*, 16 N.J. 50, 60-61, 106 A.2d 265, 270 (1954); *State v. Cherry*, 289 N.J. Super. 503, 529, 674 A.2d 589, 602 (App Div. 1995), including possession of a weapon for an unlawful purpose. *State v. Harmon*, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

New Jersey's Hate Crime Statute gives "no impression of having been tailored to permit the [racial animosity] finding to be a tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). *N.J.Stat.Ann.* 2C:44-3e does not create any impermissible presumptions nor relieve the prosecution of its burden of proving guilt; indeed, it is entirely inapplicable unless the prosecution first proves a defendant's guilt of the underlying

offense beyond a reasonable doubt. *See McMillan*, 477 U.S. at 87. The differential in sentencing is not between a nominal fine and mandatory life sentence, *see Mullaney v. Wilbur*, 421 U.S. 684, 700 (1975), but merely increases the ordinary sentencing range for a second degree offense of between five to ten years, *N.J.Stat.Ann.* 2C:43-6a(2) (West 1995), to an extended range of between ten and twenty years, *N.J.Stat.Ann.* 2C:43-7a(3) (West 1995). The statute does not change the definition of any existing offense or create a separate offense calling for a separate penalty, and there is nothing to imply that the state legislature drafted this statute to avoid the prosecution's reasonable doubt standard. *See McMillan*, 477 U.S. at 89-90; see also Pa20-22. The New Jersey Legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the weight to be given that factor...." *McMillan*, 477 U.S. at 89-90.

Although the *McMillan* Court speculated in *dicta* that the claim that a sentencing factor was really an element of the offense "would have at least more superficial appeal" if a finding of such fact exposed the defendant to greater or additional punishment, *id.* at 88, that consideration was subsequently criticized in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998), in which this Court rejected the argument that any factor triggering an increase in the maximum permissive sentence is an element of the offense which must be proven beyond a reasonable doubt.

In *Almendarez-Torres*, this Court held that subsection (b)(2) of 8 *U.S.C.* § 1326 did not describe an element of an offense but was simply a sentence enhancer. Subsection (a) of this statute defines a crime by forbidding an alien who once was deported to return to the United States without special permission, and it authorizes the imposition of a prison term of up to, but no more than, twenty years for "an alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." 8 *U.S.C.* § 1326(b)(2). The validity of this

sentencing scheme was due, in part, to the "longstanding tradition of treating recidivism as 'going to the punishment only.'" *Almendarez-Torres*, 118 S.Ct. at 1230-31 (quoting *Graham v. West Virginia*, 224 U.S. 616, 629 (1912)).

Recently revisiting the sentencing factor/element question in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215 (1999), this Court determined that a penalty provision based on a finding of serious bodily injury or death intertwined within the definition of the substantive crime of carjacking under the federal carjacking statute, 18 *U.S.C.* § 2119, was not a sentence enhancer that could be found by the sentencing court by a preponderance of the evidence, but was historically an element of the offense that had to be proven to the trier of fact beyond a reasonable doubt. The federal carjacking statute was structurally muddled in its treatment of injury as an element or penalty factor, thus prompting the *Jones* Court to consider the "traditional treatment of certain categories of important facts ... in relation to particular crimes." *Jones*, 119 S.Ct. at 1220. Under this approach, the enhanced penalty provision of the federal carjacking statute could not be viewed as a mere sentencing factor because the degree of injury to a victim has traditionally been treated, both by Congress and by state legislatures (including New Jersey, *see State v. Federico*, 103 N.J. 169, 510 A.2d 1147 (1986)), as an element of the predicate offense, such as aggravated robbery. *Jones*, 119 S.Ct. at 1220.[5]

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[5] This Court also took a structural approach in *Almendarez-Torres*, 118 S.Ct. at 1224-26, and in *Jones*, 119 S.Ct. at 1219-1222, to determine whether Congress intended to create new substantive offenses. Under this analysis, the extended term provision of New Jersey's Hate Crime Statute is clearly constitutional. The statute appears in a general sentencing provision of New Jersey's Code of Criminal Justice entitled "Authority of Court in Sentencing," and was adopted long after the Code's provisions establishing the underlying crimes. *State v. Apprendi*, 304 N.J. Super. 147, 160, 698 A.2d 1265, 1272 (App. Div. 1997) (Stern, J., (continued...)

In reaching this result, this Court was careful not to overrule its prior decision in *Almendarez-Torres* that "not every fact expanding a penalty range must be stated in a felony indictment." *Jones*, 119 S.Ct. at 1226-27. Instead, the *Jones* Court acknowledged that recidivism, the factor in issue in *Almendarez-Torres*, historically is treated as a sentencing enhancer and is "potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Jones*, 119 S.Ct. at 1227. Similarly, the instrumentality used in committing a violent felony "has always been considered by sentencing courts to bear on punishment." *McMillan*, 477 U.S. at 89-90 (this Court found constitutional a provision of Pennsylvania's Mandatory Minimum Sentencing Act, 42 *Pa.Const.Stat.Ann.* § 9712, authorizing judges to sentence anyone convicted of certain enumerated felonies to no less than five years imprisonment if the judge finds, by preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense).

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[5](...continued)
concurring) (Pa79). The statute is expressly designated "Criteria for sentence of extended term of imprisonment." The plain language and structure of the Hate Crime Statute unquestionably establishes that the statute does not add any new elements to any crime as defined in the Code, but was intended only as a sentencing enhancer. *See Jones*, 119 S.Ct. at 1219 ("some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors") and *McMillan*, 477 U.S at 85-86 (express identification of statutory provision as sentencing factor).

The Supreme Court of New Jersey, however, chose not to rely upon this structural approach: "Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (Pa16). The court relied instead on the constitutional analysis employed by the *Almendarez-Torres* Court, thus removing all reservations about the constitutionality of the extended term provision of the Hate Crime Statute.

Any claim by petitioner that *Jones* leaves open the question whether any fact resulting in a substantial increase in the penalty range is necessarily an essential element that must be proven beyond a reasonable doubt is rebuffed by the *Jones* Court's outright approval of the challenged statute in *Almendarez-Torres* authorizing a sentencing court to increase the punishment for a recidivist deportee from two years imprisonment, 8 *U.S.C.* § 1326(a), to twenty years imprisonment, 8 *U.S.C.* § 1326(b)(2). *Jones*, 119 S.Ct. at 1227. The *Jones* Court said, "our decision today does not announce any new principle of constitutional law, but merely interprets a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." *Id.* at 1228 n.11. The penalty enhancer embodied in *N.J.Stat.Ann.* 2C:44-3e is based upon the traditional nature of motive as a sentencing factor; consequently, motive need not be charged in the indictment, *Almendarez-Torres*, nor must it be submitted to the jury and proven beyond a reasonable doubt, *Jones*.

Significantly, *N.J. Court Rule* 3:21-4(e) requires the prosecution to give notice to the defendant of its intention to seek an extended term under *N.J.Stat.Ann.* 2C:44-3e within fourteen days of the entry of the defendant's guilty plea or of the return of the verdict or, where the defendant is pleading guilty pursuant to a negotiated disposition, at or prior to the plea. *N.J.Stat.Ann.* 2C:44-3e permits the sentencing court to impose an extended term only after finding racial bias by a preponderance of the evidence. The Hate Crime Statute thus affords criminal defendants the requisite procedural safeguards of notice and opportunity to be heard. Compare *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (commitment proceedings under Colorado Sex Offenders Act did not permit defendant an opportunity to present his own evidence or confront witnesses against him). Petitioner here in fact knew of the State's intention to seek an extended term prior to the entry of his guilty plea (T9-20 to 10-8), and offered the

testimony of seven character witnesses and one expert witness at the sentencing hearing before Judge Ridgway. (Pa182-235). As such, *N.J.Stat.Ann.* 2C:44-3e comports with due process of law.

One final point bears noting. The Supreme Court of New Jersey did not "invite" this Court to review the extended term provision of New Jersey's Hate Crime Statute; what the state court said was that at some future date this Court, in its supervisory capacity, would likely scrutinize "the recently enacted amendments to the federal sentencing guidelines [which] now include a hate crime penalty enhancement provision that applies to all federal crimes." (Pa17-18). Petitioner, of course, was not sentenced under the federal statute and has no standing before this Court to challenge its constitutionality. The question presented by petitioner, "whether this Court should decline the invitation of the New Jersey Supreme Court" to review *N.J.Stat.Ann.* 2C:44-3e, should be answered with a resounding "yes."

In sum, New Jersey's Hate Crime Statute creates a constitutionally-valid statutory scheme permitting the sentencing court to impose an extended term of imprisonment once it is satisfied by a preponderance of the evidence that the underlying crime was racially motivated. The New Jersey Legislature did not create a new element of any offense that must be proven beyond a reasonable doubt, but took "one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." (Pa22). The conclusion reached by the Supreme Court of New Jersey that the Hate Crime Statute does not transgress the constitutional limits erected by this Court is firmly supported by this Court's decisions addressing the "sentencing factors versus elements" debate and insures that petitioner's constitutional rights were fully protected.

CONCLUSION

Based on the foregoing arguments, the State respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

JOHN J. FARMER, JR.
Attorney General of New Jersey
Attorney for Respondent

LISA SARNOFF GOCHMAN
Deputy Attorney General
Attorney of Record

Dated: October 20, 1999

(10)

Supreme Court, U.S.
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No. 99-478

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

JOINT APPENDIX

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
Phone: (856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
Phone: (856) 225-6181

Counsel for Petitioner

JOHN J. FARMER, JR.
Attorney General of New Jersey
LISA SARNOFF GOCHMAN
Deputy Attorney General
Counsel of Record
Division of Criminal Justice
R.J. Hughes Justice Complex
P.O. Box 086
Trenton, New Jersey 08625
Phone: (609) 292-9086

Counsel for Respondent

Petition For Certiorari Filed September 20, 1999
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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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RELEVANT DOCKET ENTRIES

Jan. 19, 1995	Indictment, Superior Court of New Jersey, Law Division, Cumberland County
July 24, 1995	Transcript of plea entry
Sept. 5, 1995	Plenary Hearing, transcript, before Judge Ridgway
Sept. 15, 1995	Notice of Motion for an extended term of imprisonment
Sept. 29, 1995	Opinion, Superior Court of New Jersey, Law Division, Judge Ridgway
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – CRIMINAL
CUMBERLAND COUNTY

STATE OF NEW JERSEY	:	Indictment No. 95-01-00046-I/A
v.	:	
CHARLES APPRENDI,	:	Term: July 1994 Session: November 1994
	:	**INDICTMENT**
	:	(Filed Jan. 19, 1995)

THE GRAND JURORS of the State of New Jersey, for the County of Cumberland, upon their oaths, present that:

COUNT ONE

(Attempted Murder – First Degree)

CHARLES APPRENDI

on or about the 24th day of September 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to kill MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL

FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; contrary to the provisions of *N.J.S.A.* 2C:5-1 and 2C:11-3(a)(1), and against the peace of this State, the government and dignity of the same.

COUNT TWO

(Aggravated Assault – Second Degree)

CHARLES APPRENDI

on or about the 24th day of September 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to cause serious bodily injury to MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES, or MICHAEL FOWLKES JR., and while committing said crime CHARLES APPRENDI was in possession of a firearm; contrary to the provisions of *N.J.S.A.* 2C:12-1b(1), and against the peace of this State, the government and dignity of the same.

COUNT THREE

(Possession of a Weapon for an Unlawful Purpose – Second Degree)

CHARLES APPRENDI

on or about the 24th day of September 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, did possess a certain weapon, that is, a firearm, with purpose to use it unlawfully against the person or property of another; contrary to the

provisions of *N.J.S.A.* 2C:39-4(a), and against the peace of this State, the government and dignity of the same.

COUNT FOUR

(Unlawful Possession of a Weapon – Third Degree)

CHARLES APPRENDI

on or about the 24th day of September 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did possess a loaded rifle, to wit: Ruger model 10/22 carbine .22 LR cal. (serial number 238-49229); contrary to the provisions of *N.J.S.A.* 2C:39-5c(2), and against the peace of this State, the government and dignity of the same.

COUNT FIVE

(Harassment – Fourth Degree)

CHARLES APPRENDI

on or about the 24th day of September 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, with the purpose to harass another, engaged in a course of alarming conduct with the purpose to alarm or seriously annoy such other person, and in so doing, CHARLES APPRENDI acted at least in part with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color or ethnicity; contrary to the provisions of *N.J.S.A.* 2C:33-4(d), and against the peace of this State, the government and dignity of the same.

COUNT SIX

(Attempted Murder – First Degree)

CHARLES APPRENDI

on or about the 6th day of November 1994 or the 7th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, did purposely attempt to kill MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; contrary to the provisions of *N.J.S.A.* 2C:5-1 and 2C:11-3a(1), and against the peace of this State, the government and dignity of the same.

COUNT SEVEN

(Aggravated Assault – Second Degree)

CHARLES APPRENDI

on or about the 6th day of November 1994 or the 7th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to cause serious bodily injury to MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; contrary to the provisions of *N.J.S.A.* 2C:12-1b(1), and against the peace of this State, the government and dignity of the same.

COUNT EIGHT

(Possession of a Weapon for an Unlawful Purpose – Second Degree)

CHARLES APRPENDI

on or about the 6th day of November 1994 or the 7th day of November 1994, in the City of Vineland, County of

Cumberland, and within the jurisdiction of this Court, did possess a certain weapon, that is: a firearm, with purpose to use it unla lly against the person or property of another; contrary to the provisions of *N.J.S.A.* 2C:39-4(a), and against the peace of this State, the government and dignity of the same.

COUNT NINE

(Unlawful Possession of a Weapon – Third degree)

CHARLES APPRENDI

on or about the 6th day of November 1994 or the 7th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did possess a loaded rifle, to wit: Ruger model 10/22 carbine .22 LR cal. (serial number 238-49229); contrary to the provisions of *N.J.S.A.* 2C:39-5c(2), and against the peace of this State, the government and dignity of the same.

COUNT TEN

(Harassment – Fourth Degree)

CHARLES APPRENDI

on or about the 6th day of November 1994 or the 7th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, with the purpose to harass another, engaged in a course of alarming conduct with the purpose to alarm or seriously annoy such other person, and in so doing, CHARLES APPRENDI acted at least in part with ill will, hatred or bias toward, and with a purpose to intimidate,

an individual or group of individuals because of race, color or ethnicity; contrary to the provisions of *N.J.S.A.* 2C:33-4(d), and against the peace of this State, the government and dignity of the same.

COUNT ELEVEN

(Attempted Murder – First Degree)

CHARLES APPRENDI

on or about the 7th day of November 1994 or the 8th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to kill MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; contrary to the provisions of *N.J.S.A.* 2C:5-1 and 2C:11-3a(1), and against the peace of this State, the government and dignity of the same.

COUNT TWELVE

(Aggravated Assault – Second Degree)

CHARLES APPRENDI

on or about the 7th day of November 1994 or the 8th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to cause serious bodily injury to MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; and while committing said crime was in possession of a firearm; contrary to the provisions of *N.J.S.A.* 2C:12-1b(1), and against the peace of this State, the government and dignity of the same.

COUNT THIRTEEN

(Possession of a Weapon for an Unlawful Purpose – Second Degree)

CHARLES APPRENDI

on or about the 7th day of November 1994 or the 8th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, did possess a certain weapon, to wit: a firearm, with purpose to use it unlawfully against the person or property of another; contrary to the provisions of *N.J.S.A.* 2C:39-4a, and against the peace of the State, the government and dignity of the same.

COUNT FOURTEEN

(Unlawful Possession of a Weapon – Third Degree)

CHARLES APPRENDI

on or about the 7th day of November 1994 or the 8th day of November 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did possess a loaded rifle, to wit: Ruger, model 10/22 carbine .22 LR cal. (serial number 238-49229); contrary to the provisions of *N.J.S.A.* 2C:39-5c(2), and against the peace of this State, the government and dignity of the same.

COUNT FIFTEEN

(Harassment – Fourth Degree)

CHARLES APPRENDI

on or about the 7th day of November 1994 or the 8th day of November 1994, in the City of Vineland, County of

Cumberland, and within the jurisdiction of this Court, with the purpose to harass another, engaged in a course of alarming conduct with the purpose to alarm or seriously annoy such other person, and in so doing, CHARLES APPRENDI acted at least in part with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color or ethnicity; contrary to the provisions of *N.J.S.A.* 2C:33-4(d), and against the peace of this State, the government and dignity of the same.

COUNT SIXTEEN

(Attempted Murder – First Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to kill MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; contrary to the provisions of *N.J.S.A.* 2C:5-1 and 2C:11-3a(1), and against the peace of this State, the government and dignity of the same.

COUNT SEVENTEEN

(Aggravated Assault – Second Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, purposely did attempt to cause

serious bodily injury to MICHAEL FOWLKES SR., MATTIE FOWLKES, PHIL FOWLKES, DAWN FOWLKES or MICHAEL FOWLKES JR.; and while committing said crime CHARLES APPRENDI was in possession of a firearm; contrary to the provisions of *N.J.S.A.* 2C:12-1b(1), and against the peace of this State, the Government and dignity of the same.

COUNT EIGHTEEN

(Possession of a Weapon for an Unlawful Purpose – Second Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, did possess a certain weapon, that is, a firearm, with purpose to use it unlawfully against the person or property of another; contrary to the provisions of *N.J.S.A.* 2C:39-4(a), and against the peace of this State, the government and dignity of the same.

COUNT NINETEEN

(Unlawful Possession of a Weapon – Third Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did possess a loaded rifle, to wit: Ruger model 10/22 carbine .22 LP cal. (serial number 238-49229); contrary to the provisions of *N.J.S.A.* 2C:39-5c(2), and against the peace of this State, the government and dignity of the same.

COUNT TWENTY

(Harassment – Fourth Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, with the purpose to harass another, engaged in a course of alarming conduct with the purpose to alarm or seriously annoy such other person, and in so doing CHARLES APPRENDI acted at least in part with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color or ethnicity; contrary to the provisions of *N.J.S.A.* 2C:33-4(d), and against the peace of this State, the government and dignity of the same.

COUNT TWENTY ONE

(Unlawful Possession of a Prohibited Weapon – Third Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did have in his possession a prohibited weapon, that is, a destructive device which was an incendiary device; contrary to the provisions of *N.J.S.A.* 2C:39-3a, and against the peace of this State, the government and dignity of the same.

COUNT TWENTY TWO

(Unlawful Possession of a Prohibited Weapon – Third Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did have in his possession a prohibited weapon, that is, a destructive device which was an anti-personnel bomb; contrary to the provisions of *N.J.S.A.* 2C:39-3a, and against the peace of this State, the government and dignity of the same.

COUNT TWENTY THREE

(Unlawful Possession of a Prohibited Weapon – Fourth Degree)

CHARLES APPRENDI

on or about the 22nd day of December 1994, in the City of Vineland, County of Cumberland, and within the jurisdiction of this Court, knowingly did have in his possession a prohibited weapon, that is, a firearm silencer; contrary to he [sic] provisions of *N.J.S.A.* 2C:39-3(c), and against the peace of this State, the government and dignity of the same.

MICHAEL BROOKE FISHER
CUMBERLAND COUNTY
PROSECUTOR

By: /s/ Robert J. Luther
Assistant County Prosecutor

Endorsed:

/s/ William J. [illegible]
Foreperson

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CUMBERLAND COUNTY
INDICTMENT NO. 95-01-46-I/A

STATE OF NEW JERSEY,	)	TRANSCRIPT
Plaintiff,	)	OF
vs.	)	PLEA ENTRY HEARING
CHARLES APPRENDI,	)	
Defendant.	)	

Place: Cumberland County
Courthouse
Broad and Fayette Streets
Bridgeton, New Jersey

Date: July 24th, 1995

BEFORE:

THE HONORABLE RUSHTON H. RIDGWAY, J.S.C.

TRANSCRIPT ORDERED BY:

THE HONORABLE RUSHTON H. RIDGWAY, J.S.C.

APPEARANCES:

ROBERT J. LUTHER, FIRST ASSISTANT PROSECUTOR
Attorney on behalf of the State of New Jersey

JOSEPH D. O'NEILL, ESQ.,
Attorney on behalf of the Defendant

THE TYPE-RIGHT-ER
Carol H. Vendzules
Certified Agency Director/
Transcriber, AOC #268
State of New Jersey
(609) 881-2422

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EXHIBITS:	IDENTIFICATION	EVIDENCE
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[p. 3] (Whereupon on the record)

THE COURT: All right, Mr. O'Neill.

MR. O'NEILL: Good afternoon, Your Honor; Joe O'Neill, appearing for defendant, Charles Apprendi, for the purpose of an entry of a plea.

MR. LUTHER: Robert Luther, First Assistant Prosecutor, on behalf of the State.

THE COURT: All right. You have the paperwork there?

MR. O'NEILL: Yes, I do, Judge.

THE COURT: All right; Mr. Apprendi, do you want to stand up, please; raise your right hand.

CHARLES APPRENDI, DEFENDANT, SWORN

DIRECT EXAMINATION BY THE COURT:

Q. Now, I understand you're entering a plea in this case, a plea of guilty, to something?

A. Yes.

Q. All right.

THE COURT: What is he entering a plea to, Mr. O'Neill?

MR. O'NEILL: Just the one – or two, Lou. The judge gets one.

THE CLERK: No, he gets the whole thing.

THE COURT: I get the whole packet.

MR. O'NEILL: Yeah; but this is not a package. This is the plea agreement.

[p. 4] THE COURT: I get that; I get that.

MR. O'NEILL: You want it? Okay. I will do it from the plea agreement; all right.

THE COURT: All right. Apparently, you're entering pleas of guilty of possession of a weapon for an unlawful purpose?

MR. O'NEILL: Two counts, Judge.

THE COURT: Two counts of that?

MR. O'NEILL: Yes, sir.

THE COURT: And possession of a prohibited weapon?

MR. O'NEILL: A bomb; yes, sir.

THE COURT: Is that correct?

THE WITNESS: Yes.

DIRECT EXAMINATION BY THE COURT:

Q. You pleading guilty because you are guilty?

A. Yes.

Q. Okay. And, apparently, on the possession – each of the possession of the weapon charges, as I read this, the length –

Well, why don't you put it on the record, because I will understand it perhaps better 'cause you have reviewed this with him.

MR. O'NEILL: I will, Judge.

THE COURT: Okay.

MR. O'NEILL: Let me ask the defendant some questions, [p. 5] Judge, if I may.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Charles, we have talked over a period of time about a plea bargain agreement; haven't we?

A. Yes.

Q. And I've gone over the indictment with you and all the 23 charges against you that are contained in that indictment?

A. Yes.

Q. All right. You understand that the agreement that has been made by the First Assistant Prosecutor, Mr.

Luther, and me and you is not binding on the judge; he does not have to accept that. Do you understand it?

A. Yes.

Q. He may find it is inappropriate for many different reasons and decide that you have to stand trial; do you understand that?

A. Yes.

Q. All right. Now, you understand that out of the 23 separate counts in the indictment, that the Prosecutor is recommending that 20 of those counts be dismissed in exchange for your admitting your guilt and pleading guilty to the three charges just enunciated by His Honor; do you understand that?

A. Yes.

Q. All right. Now, do you remember my giving you a letter of May 11, 1995 in which I went over all the charges [p. 6] against you, the evidence against you, what maximum terms and fines you would be exposed to; do you understand that?

A. Yes.

Q. Okay. You remember I said that if you were convicted of everything with which you are charged, you would face a jail term of a maximum of 150 years and fines totaling $882,000; do you remember that from my letter?

A. Yes.

Q. Okay. But, by virtue of the plea bargain agreement, if His Honor accepts it, you will not be sentenced

to nearly such long terms, nor fines, as I just indicated; do you understand that?

A. Yes.

Q. As you stand before His Honor, Judge Ridgway, today, are you under the influence of any alcohol or drugs?

A. No.

Q. Are you appearing before His Honor voluntarily?

A. Yes.

Q. Have I gone over with you the plea bargain agreement in detail and have I asked you to sign it?

A. Yes.

Q. And you have signed it?

A. Yes.

Q. You understand the contents of that agreement?

A. Yes.

[p. 7] Q. You understand and you agree that nobody is trying to coerce you or force you to do this, you understand and agree?

A. Yes.

Q. You understand that you have certain rights that you are giving up by virtue of this plea bargain agreement.

For example, you have a right to a trial by jury; do you understand that?

A. Yes.

Q. You have the right to call witnesses on your own behalf; do you understand that?

A. Yes.

Q. Do you understand also that you have the right through me or some other lawyer, if you wished, to cross-examine witnesses that would testify on behalf of the State?

A. Yes.

Q. You understand that before being found guilty, the jury would have to decide the guilt against you by a test of beyond a reasonable doubt. You understand you're giving up all of these rights by virtue of this plea bargain agreement; do you understand?

A. Yes.

Q. All right. Now, do you understand that under Counts 3 and 18, the length of the sentence is up to the court, including whether these counts run consecutively or concurrently; do you understand that?

[p. 8] A. Yes.

Q. You know that, don't you, and correct me if you don't understand anything, that consecutive means that the sentences could be tacked on one after the other, rather than concurrently which means that they run together; –

A. Yes.

Q. – do you understand that?

A. Yes.

Q. Okay.

THE COURT: Now, before you go any further, do you understand that the – apparently, the 3rd and the 18th counts are crimes of the second degree?

THE WITNESS: Yes.

THE COURT: And that the sentence range is between five and ten years on each one?

THE WITNESS: Yes.

THE COURT: That's the normal sentence.

And that if you were to receive the maximum on each sentence – the normal sentence and they were to run consecutively on those two counts, you could get 20 years?

THE WITNESS: Yes.

THE COURT: And is he eligible for an extended term, Prosecutor?

MR. LUTHER: Your Honor, not only could he get five or ten years on each second degree, there could be up to five [p. 9] years without parole on each second-degree count.

THE COURT: On the Graves Act?

MR. LUTHER: Yes; they're both Graves Act offenses.

THE COURT: Okay.

Do you understand that?

THE WITNESS: Yes.

THE COURT: On each count?

MR. LUTHER: Also, Your Honor, –

THE COURT: Is that, Prosecutor, on each count?

MR. LUTHER: Yes.

THE COURT: Which would mean a total of a maximum of 20 years, that he would have to do ten before being eligible for parole; is that what you're saying?

MR. LUTHER: That is correct.

THE COURT: You understand that, Mr. Apprendi?

THE WITNESS: Yes.

MR. O'NEILL: That's included in my letter of May 11th, isn't it, Mr. Apprendi, of this year?

THE WITNESS: Yes.

MR. LUTHER: Your Honor, one other aspect of the plea agreement is that the State will be moving for an extended term on Count 18 of the indictment alleging racial bias as the grounds. Therefore, if the extended term is granted by the court, Mr. Apprendi could be sentenced on Count 18 to up to 20 years in prison, must serve ten.

[p. 10] THE COURT: Mr. Apprendi, did you hear the –

THE WITNESS: Yeah, I understand.

THE COURT: – Prosecutor?

THE WITNESS: Yeah.

THE COURT: Did you understand it?

THE WITNESS: Yes.

MR. O'NEILL: Judge, I have also discussed at length the motion that we have filed before Your Honor on that issue.

THE COURT: Just wait a minute.

Those – now, we've talked about two of the sentences – two of the counts, I mean.

MR. LUTHER: That's correct.

THE COURT: What about the third count which is Count Number 22?

MR. LUTHER: Your Honor, Count 22, the length of the sentence would be up to the court; but the plea agreement specifies that count shall run concurrently with Counts 3 and 18. So I think it's important that the court inquire of Mr. Apprendi that he understands the maximum, potential sentence which could be announced by the court would be 30 years, must serve 15.

THE COURT: Do you understand that?

MR. O'NEILL: Well, you know, let me check something here, Judge, if I may.

(Whereupon brief pause on record; Mr. Luther and Mr. [p. 11] O'Neill conferring off the record)

MR. O'NEILL: Judge, we're talking about the racially-motivated aspect –

THE COURT: I understand that and that is subject to your attack at a later date.

True?

MR. O'NEILL: That is the subject of the motion that's been filed.

THE COURT: Well, what he's talking about is, if the motion is denied and I sentence him to the maximum utilizing that statute, that he could be sentenced up to 30 years with a maximum – with a 15-year period of parole ineligibility.

MR. O'NEILL: Yes.

THE COURT: True?

MR. O'NEILL: Yes.

THE COURT: And if that – if your motion to attack that statute is granted, what's the maximum he faces?

MR. O'NEILL: Twenty, must serve ten.

THE COURT: Do you understand that?

THE WITNESS: Yes.

MR. O'NEiLL: I think the Prosecutor agrees.

Tell me, Mr. Luther, if you disagree.

MR. LUTHER: I agree with that, Judge.

THE COURT: I understand it; but I want to make sure that the defendant understands it.

[p. 12] Do you understand that, sir?

THE WITNESS: Yes.

THE COURT: Okay. Go ahead, Mr. O'Neill.

MR. O'NEILL: Judge, there is a recommendation for no imposition of fines in this case.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Even though the maximum fine could be as I indicated earlier, except for the statutorily mandatated (sic) – mandated fine of $100 for the VCCB, which is the Violent Crime Compensation Board that I explained to you earlier, Mr. Apprendi, and the additional $75, that's on each count, $75 for the Safe Streets Act. That's a written law called a statute and the judge has to do that. Do you understand that?

A. Yes.

Q. Now, I want you to understand also, as I talked to you about previously, that the Prosecutor is going to reserve his right to argue for the stiffest at the time the court would impose a sentence. He is going to request the extended sentence term that His Honor has just gone over with all of us here today and the Prosecutor is also going to request a minimum term of prison without the right to parole; do you understand that?

A. Yes.

Q. Okay. You understand that these crimes, the three to which you are pleading guilty of the 23 charges, involve the [p. 13] unlawful use of a gun to scare somebody on two occasions, they being November and December of last year, 1994; do you understand that?

A. Yes.

Q. And also the bomb which you were found in possession of at your home immediately consequent to the shooting incident of December of 1994?

A. Yes.

Q. All right. Do you have any questions about this so far? I know it's a lot for you to understand, but you are a pharma (sic) – a pharmacist, you're an educated man; do you have any questions so far?

A. No.

Q. And –

THE COURT: Let me ask you this, Mr. Apprendi: You've had an opportunity this morning to sit down with Mr. O'Neill. I am making the assumption that you've discussed basically this arrangement that is being described that you've discussed this prior to today.

THE WITNESS: Yes.

THE COURT: And had an opportunity to think about it?

THE WITNESS: Yes.

THE COURT: To reflect on it?

THE WITNESS: Yes.

THE COURT: Do you think that under the circumstances, [p. 14] knowing what the proof is and after discussing the legalities of it with Mr. O'Neill, that this plea is in your best interest?

THE WITNESS: Yes.

THE COURT: You understand, of course, with Counts – that if – the court's not bound by this recommendation. I can reject it.

THE WITNESS: Yes.

THE COURT: And if I reject it, you can go back to your not guilty plea and try your case in front of a jury; and, if you do on these counts, if you do that, Number One, anything you are going to tell me today can't be used against you. Do you understand that?

THE WITNESS: Yes.

THE COURT: Do you further understand that we've described for you – at least your lawyer and Mr. Luther of the Prosecutor's Office have described for you what the maximum sentence you could receive if you went to trial in front of a jury and were convicted on those three counts; do you understand that? You understand that?

THE WITNESS: Yes. Yes, I do.

THE COURT: You understand that the 3rd and the 18th counts are crimes of the second degree that carry with them, forgetting about the Graves Act, forgetting about the bias portion of it, forgetting about the references to those two [p. 15] aspects of the case; but second-degree crimes carry with them a presumption, Number One, that you're going to prison and the presumptive sentence is seven years on each of those two counts.

Do you understand that?

THE WITNESS: Yes.

THE COURT: Even if I were to, which I apparently have the ability to do, is to treat these as third-degree counts for purposes of sentencing, even if I were to do that, the presumption is that you will still incur a jail sentence.

THE WITNESS: Yes.

THE COURT: You understand that?

THE WITNESS: Yes.

THE COURT: All right. Go ahead, Mr. O'Neill.

MR. O'NEILL: That's all I have, unless Your Honor or the Prosecutor wishes to examine him.

THE COURT: Do you – this plea form here which describes what we've just discussed and also reiterates or is a written record of what we've put on, verbally, on the record about your understanding of the charges and you're pleading guilty because you are guilty and the fact that you understand you're giving up a jury trial and among other things; in any event, did you go over these forms with Mr. O'Neill before you signed them?

THE WITNESS: Yes, I did.

[p. 16] THE COURT: Did you understand them?

THE WITNESS: Yes.

THE COURT: You read and write English?

THE WITNESS: Yes.

THE COURT: All right. And are the answers true?

THE WITNESS: Yes.

THE COURT: Okay. Mr. Luther, anything else you want to develop on the record?

MR. LUTHER: No, Your Honor.

THE COURT: Now, –

MR. O'NEILL: Your Honor, could I ask –

THE COURT: Now, just one other thing, just so it's clear in my mind and that the defendant understands. "The defendant," and I am reading from the plea agreement: "The defendant understands that any appeal shall operate to void the entire plea agreement."

MR. LUTHER: Judge, the next sentence on there indicates that he may appeal the sentence, however, without voiding the entire plea agreement.

THE COURT: Well, it doesn't say that. It just says, "The defendant may appeal this sentence." The understanding is that if he appeals it, it doesn't void the entire plea agreement; is that what you're saying –

MR. LUTHER: Yes.

THE COURT: – telling me?

[p. 17] MR. O'NEILL: That is our understanding, Judge.

THE COURT: No matter what the basis of the appeal is?

MR. LUTHER: Well, that's assuming that the appeal is limited to the issue of sentence, the State will not move to retract the plea agreement.

THE COURT: I mean, even if the issue that is raised on appeal does not relate to the bias crime aspect of it – 'cause I understand that's really the legal issue that's sort of up in the air.

MR. O'NEILL: It is, Judge.

THE COURT: All right. I mean, if there's some other aspect of the sentence that bothers him and he takes an appeal, it's not going to vitiate the sentence?

MR. LUTHER: That is correct, Judge.

THE COURT: All right. As long as everybody understands what we're doing here.

MR. O'NEILL: Judge, may I ask one more question of Mr. Apprendi?

THE COURT: Sure.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Are you satisfied with the services rendered by me and my law firm thus far in this matter?

A. Yes.

Q. Thank you.

THE COURT: Okay. Now, do you have a motion pending?

[p. 18] MR. O'NEILL: I do, Judge.

THE COURT: That looks forward to what, if it's granted?

MR. O'NEILL: Well, that would vitiate the statutory provision which would allow for an enhanced sentencing due to a racially-motivated or biased crime. We

believe that the burden of proof is improper in view of the historical treatment of the criminal law and it's so enunciated in our brief, Judge.

THE COURT: Okay. That has to be disposed of before sentencing, I would assume.

MR. O'NEILL: Yes, Judge; the same day, if Your Honor pleases.

THE COURT: Yeah; I understand; but, in point of time, whether it be days or moments, it should precede the sentencing?

MR. O'NEILL: Yes.

THE COURT: Okay.

What's the sentence date?

THE CLERK: September 8th.

THE COURT: Okay. Now, you want – are you going to argue orally this motion or are you going to submit on the papers?

MR. O'NEILL: I would like to, not only argue it orally and rely on that, plus the presentation of a brief which is unfiled; but, also, present the testimony of Dr. Gerald [p. 19] Cooke, who is a forensic psychologist, who has examined the defendant.

THE COURT: Okay. When is – when is the sentence date; did you say?

THE CLERK: September 8th.

MR. LUTHER: Judge, could I request September 15.

THE COURT: Yeah; if we do it September 15th, can we have the – can we have the motion returnable and heard on September the 1st?

MR. LUTHER: That's fine by me, Judge.

MR. O'NEILL: Surely, Judge.

THE COURT: That's two weeks before the sentence date.

MR. O'NEILL: The only thing is this: You know, I've tried to make this as cost-effective for Mr. Apprendi's family that I can, Judge. That's why I wanted everything on a one day – if it's not inconvenient for Your Honor.

THE COURT: No, I can't do it all in one day, because if your arguments have any merit to them, and I assume that they will have some merit to them, I've got to give it some consideration and I am not going to just go into the back room, in my chambers, and take ten minutes to think about it and then come back out here and make a decision. I want some time to – and maybe do some further research.

MR. O'NEILL: At the court's pleasure, yes, sir; we will appear both times, of course.

[p. 20] THE COURT: September 1st.

Mr. Luther, can you have your brief in a week ahead of time?

MR. LUTHER: Yes, Judge.

THE COURT: Okay. Which takes us back to August the 25th; September 1st will be the return date and I will hear oral argument and then – whatever oral

testimony there is on September the 1st and I will sentence him on September the 15th.

MR. LUTHER: Judge, what day is September 1st?

THE COURT: Friday.

MR. LUTHER: What is the last week in August? I am on vacation the last week in August.

THE COURT: Well, then you can't do it September (sic) 25th. You can't have your brief – maybe you can. Can you have your brief in by then?

MR. LUTHER: Okay; September 1 is a Friday; that would be the last Friday –

THE COURT: Of that week, so you can't – you won't be here that week; is that what you're telling me?

All right. Then we will listen to it September the 8th.

MR. O'NEILL: Motion September 8th.

THE COURT: Right; I will hear the –

MR. LUTHER: Judge, September 8th – not to [p. 21] inconvenience the court, but September 8th is the beginning of the Prosecutor's Convention that weekend. I could give you September 7th; it's a Thursday, might actually work out better.

THE COURT: He's getting better as he gets older.

MR. LUTHER: (chuckling).

THE COURT: September the 8th is a Friday, and he tells me the 7th is a Thursday; you're very astute.

What would you like –

I will reserve September the 7th at 1:30.

MR. LUTHER: Fine.

THE COURT: For oral argument and I will hear any testimony, including this doctor that the defense wants to present.

And September the 15th which is the following Friday, a week from the day of the – a week from the 8th, I will impose sentence.

MR. LUTHER: Okay.

THE COURT: And you're going to have your brief in by?

MR. LUTHER: Is Mr. O'Neill's brief done at this point?

THE COURT: September the 1st?

MR. LUTHER: I will have it in before I leave on vacation.

THE COURT: Fine.

MR. LUTHER: We still have to take a factual basis [p. 22] from the defendant.

MR. O'NEILL: All right.

DIRECT EXAMINATION BY MR. O'NEILL:

Q. Mr. Apprendi, let me invite your attention back to November and to December of 1994 and ask if on both of those occasions you had possession of a gun for an unlawful purpose, namely, to frighten some people in a

house, people named Foulkes, although you didn't know who they were at the time.

Is that true?

You discharged a weapon, didn't you, on both those occasions, November –

A. Yes.

Q. – and December? Okay.

And on the occasion of the second discharge of a weapon, you were apprehended by the police at that time and there was in your possession on your premises a bomb; is that also true?

A. Yes.

Q. Okay.

MR. O'NEILL: No further questions, Judge.

THE COURT: The plea must be related to what he did at this –

What's the fellow's name? Foulkes?

MR. O'NEILL: Foulkes; well, he didn't – Judge, I don't think that, most respectfully, has anything to do with [p. 23] it.

Correct me if I am wrong, 'cause I am going to do it the right way in accordance with Your Honor's wishes, but I think that he has already said before the court a factual basis for the plea; namely, that he had possession of a weapon on two occasions for an unlawful purpose, as stated. He also had possession of a bomb on the second of those dates when the unlawful possession of the gun occurred.

MR. LUTHER: Judge, if I could just ask him a couple of other questions.

If I could just confer with Mr. O'Neill, briefly.

(Whereupon brief, inaudible pause on record; attorneys conferring off the record)

MR. O'NEILL: If Your Honor pleases, there were four incidents originally alleged in the indictment; okay? The defense, as part of the plea bargain, has agreed to plead guilty to two of those. There was an offense alleged in September, namely, September 24 of 1994, as well as one, as previously mentioned, in November of 1994. So what we would like to do at this time so we don't have to do the paperwork all over again, we're not changing anything. We're leaving the pleas to the same charges, but will change the date from November to September of 1994.

Is that in accord with your understanding, Mr. Luther?

MR. LUTHER: Yeah; Count 3, to which the defendant is [p. 24] pleading guilty, is alleging September 24th, 1994.

MR. O'NEILL: Though the dates aren't important to the prosecution or to the defense, but the plea of guilty to those charges is important to both sides.

THE COURT: Well, he's certainly – we have to establish the date that it took place and where it took place and –

What's the date?

MR. O'NEILL: Well, the date that we will plead to is September 22 of 1994, Judge.

MR. LUTHER: Excuse me, September 24.

THE COURT: You understand that, Mr. Apprendi?

MR. O'NEILL: September 24 of 1994.

THE COURT: September 24th, that's the date you're admitting this – these acts occurred?

MR. O'NEILL: He's admitting to it, Judge, and I am going to ask him on the record; but he doesn't know the exact date, I can tell you that. September 24 of 1994.

THE COURT: Is it close – is that a close date?

THE WITNESS: Yes.

THE COURT: Okay.

Now, let me ask –

What is it, Prosecutor?

MR. LUTHER: If I could just ask a couple more questions to the factual basis?

[p. 25] THE COURT: Go ahead.

CROSS-EXAMINATION BY MR. LUTHER:

Q. Mr. Apprendi, on September 24, 1994 did you fire a rifle shot into the residence of 5211 East Chestnut Avenue in the City of Vineland?

A. Yes.

Q. Okay. And you didn't hit anyone with that bullet; correct?

A. Yes.

Q. Okay. And did you fire a shot into the second floor bedroom window at that time?

A. What was the question again?

Q. Okay. Did you fire a single shot from a rifle into the second floor – into a second-floor window at that residence on September 24, 1994?

A. I'm not sure about the window, but everything else is correct.

Q. Okay. Well, at least you admit firing a rifle shot at the home on that date; is that correct?

A. Yes.

Q. Okay. And the location of this residence was about a half a mile, three-quarters of a mile from your residence; is that correct?

A. Yes.

Q. All right. And on December 22 of 1994, did you fire [p. 26] several rifle shots into the residence located at 5211 East Chestnut Avenue in the City of Vineland?

A. Yes.

Q. And your purpose on both occasions was to scare the people in the home; is that correct?

A. Well, (long pause) –

MR. LUTHER: Your Honor, Mr. O'Neill informs me that Mr. Apprendi has already answered that question. That that question was already asked of him.

THE COURT: Well, it has to be the use of a weapon for an unlawful purpose; you've got to have the purpose on the record.

MR. LUTHER: I agree, Judge.

MR. O'NEILL: I asked him that question; he answered in the affirmative, Judge.

THE COURT: Well, why can't he again restate it? Is that – was that question put to him? Did he do it to scare the people or a person inside? Are you telling me that that was put on the record? Is that what you're telling me?

MR. O'NEILL: I asked him that question and he answered in the affirmative. We're not trying to hold anything back here, Judge. As in any adversarial proceeding, a question that's been asked previously and answered previously is objectionable.

THE COURT: I don't remember it being asked. Now, [p. 27] what do you want me to do? Get a copy of the transcript and if I don't and if it wasn't asked, then we haven't put an appropriate factual basis on the record.

Now, I understand, and it's quite clear to me, that he – and any other number of defendants are reticent when it comes to admitting their guilt. However, the law is the law. We've got to have a factual basis on the record.

MR. O'NEILL: Can I have half a minute, Judge?

THE COURT: Can you what?

MR. O'NEILL: Have a half a minute to talk to him?

THE COURT: Take a half an hour or more; take a half a minute; I don't care. Take as much time as you want.

MR. O'NEILL: I don't need that much time, Judge.

(Whereupon Mr. O'Neill and his client, Mr. Apprendi, conferring off the record; brief pause)

THE COURT: Let me remind you, too, there is going to be a Pre-Sentence Investigation and they're going to ask him for a – for his factual basis. And I will tell you right now, if there's any dancing around where he denies it; you know, you get this too many times. You know, the official version is such and such and then the next part down on the page, we all know is, defendant's version and, oh, he denies it. He just took a plea to get it off his back, because his lawyer –

MR. O'NEILL: That's not going to happen here, Judge.

THE COURT: I am telling you now. I will just vitiate [p. 28] the plea and we will start all over again.

MR. O'NEILL: I know you will and you will be right, of course.

THE COURT: Okay. Now, –

MR. O'NEILL: I understand that.

Can I confer with my client?

THE COURT: Go ahead.

(Whereupon Mr. O'Neill and his client, Mr. Apprendi, conferring off the record; five-minute pause)

MR. O'NEILL: I appreciate the court's indulgence, really, Judge. I know you have better things to do.

I think we're ready.

May I address the witness with a question, Judge?

THE COURT: Sure.

MR. O'NEILL: Do you mind, Mr. Prosecutor?

MR. LUTHER: No.

MR. O'NEILL: All right.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Now, Mr. Apprendi, when you discharged that weapon on each of those occasions, would it be fair to say that you did so not knowing whether anybody was in the property, but recognizing that upon either hearing the sound of the discharge of the weapons or upon seeing the damage caused by the bullet, that would have possibly scared somebody; can you accept that?

A. Yes.

[p. 29] MR. O'NEILL: No further questions.

THE COURT: Mr. Prosecutor.

MR. LUTHER: I will leave it in the court's discretion.

THE COURT: All right. As long as the defendant acknowledges that that is the unlawful purpose.

REDIRECT EXAMINATION BY MR. O'NEILL:

Q. Do you so acknowledge, Mr. Apprendi, –

Do you acknowledge that what you did was for an unlawful purpose?

A. Yes.

THE COURT: All right. You know, whether it's to scare someone means to me that it puts someone in fear or to harass them and unless there's a contradiction to that from you or the defendant at this point, I will assume that's why it was done and I will accept the plea.

Anything else?

MR. O'NEILL: Not from the defense, Judge.

THE COURT: Anything else, Prosecutor?

MR. LUTHER: No, Your Honor.

THE COURT: All right.

Now, we've got the schedule set; right?

MR. O'NEILL: Yes, sir.

THE COURT: Okay. See you on those dates.

MR. LUTHER: I'm sorry, Judge, –

[p. 30] SHERIFF: All rise.

MR. LUTHER: – one – one further matter. Pursuant to the plea agreement, the Court Rule requires that a Notice of Motion for an extended term be served at the time of the plea. So let the record reflect that I am currently serving a copy of the Notice of Motion on Mr. Apprendi and Mr. O'Neill.

MR. O'NEILL: I accept it, Judge.

MR. LUTHER: Okay.

THE COURT: Okay. Thank you, gentlemen. We will recess until 1:30.

(Whereupon the hearing concluded at this time)

CERTIFICATION

I, CAROL H. VENDZULES, the assigned transcriber, do hereby certify that the foregoing transcript of proceedings in the Superior Court on 7/24/95, Tape No. 16890(1), Index No. from 1435 to 3820, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate record of the proceedings according to the best of my ability and knowledge.

Signature /s/ Carol H. Vendzules
CAROL H. VENDZULES
CERTIFIED DIRECTOR/
TRANSCRIBER OF THE
STATE OF NEW JERSEY,
AOC #268
THE TYPE-RIGHT-ER

DATED: 9-19-95

MICHAEL BROOKE FISHER
CUMBERLAND COUNTY PROSECUTOR
43 Fayette Street
Bridgeton, New Jersey 08302
(609) 453-0486

STATE OF NEW JERSEY Plaintiff, v. CHARLES APPRENDI, Defendant.	: SUPERIOR COURT OF : NEW JERSEY COUNT OF : CUMBERLAND LAW : DIVISION - CRIMINAL : PART : : Indictment No. : 95-01-00046-I/A : : **NOTICE OF MOTION**

TO: Charles Apprendi
Cumberland County Jail
54 Broad Street
Bridgeton, New Jersey 08302

Joseph D. O'Neill, Esquire
30 West Chestnut Avenue
Vineland, New Jersey 08360

PLEASE TAKE NOTICE, that on September 15, 1995, at 9:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned Assistant Prosecutor will move for the imposition of an extended term of imprisonment for the above-captioned defendant on count 18 of the indictment, pursuant to *N.J.S.* 2C:44-3, 2C:43-7 and 2C:44-6(e).

The State will rely upon *N.J.S.* 2C:44-3(e) and testimony to be adduced at the sentencing hearing.

/s/ Robert J. Luther
Robert J. Luther
First Assistant Prosecutor

NEW JERSEY SUPERIOR COURT PAGE 01 OF 02
CUMBERLAND COUNTY LAW DIVISION - CRIMINAL

STATE OF NEW JERSEY 95000019-001 A

v.

CHARLES APPRENDI

DATE OF BIRTH 03/04/1955

DATE OF ARREST 12/22/1994

DATE OF THE ORIGINAL PLEA 03/13/1995

S.B.I.# 8873358

DATE IND/ACCUSATION FILED 01/19/1995

ORIGINAL PLEA WAS

XX NOT GUILTY __ GUILTY

XX JUDGMENT OF CONVICTION

CHANGE OF JUDGMENT

XX ORDER FOR COMMITMENT

INDICTMENT/ACCUSATION DISMISSED

JUDGMENT OF ACQUITTAL

ADJUDICATION BY
XX GUILTY PLEA DATE 07/24/1995

_____ JURY TRIAL DATE _____

_____ NON-JURY TRIAL DATE _____

_____ DISM/ACQUITTED DATE _____

ORIGINAL CHARGES ON IND 95-01-00046-I

COUNT(S)	DESCRIPTION	STATUTE
01, 006	CRIMINAL ATTEMPT ATTEMPT MURDER - PURPOSELY	1 2C:5-1
02, 007	AGG ASSLT SBI	2 2C:12-1B(1)
03, 008	UNLAW PURPOSE-FIREARMS	2 2C:39-4A

04, 014	UNLAW POSS WEAP-LOADED	3 2C:39-5C(2)
05, 010	ETHNIC INTIMIDATION (HARRASSMENT)	4 2C:33-4D
09,	UNLAW POSS WEAP-RIFLES/SHOTGUN	3 2C:39-5C
011, 016	CRIMINAL ATTEMPT ATTEMPT MURDER - PURPOSELY	1 2C:5-1
012, 017	AGG ASSLT SBI	2 2C:12-1B(1)
013, 018	UNLAW PURPOSE-FIREARMS	2 2C:39-4A
015, 020	ETHNIC INTIMIDATION (HARASSMENT)	4 2C:33-4D

FINAL CHARGES

COUNT(S)	DESCRIPTION	DEGREE	STATUTE
003	UNLAW PURPOSE-FIREARMS	2	2C:39-4A
018	UNLAW PURPOSE-FIREARMS	2	2C:39-4A
022	WEAP POSS-DESTRUCT DEVICE	3	2C:39-3A

IT IS THEREFORE ON SEPTEMBER 29 1995 ORDERED AND ADJUDGED THAT THE DEFENDANT IS SENTENCED AS FOLLOWS:

COUNT #18: DEFENDANT COMMITTED TO NJSP FOR 12 YEARS; MUST SERVE 4 YEARS WITHOUT PAROLE. DEFENDANT TO RECEIVE CREDIT FOR TIME SERVED. PAY $75.00 SSCP; $100.00 VCCB PENALTY AND $1,980.00 RESTITUTION PAYABLE TO DEPARTMENT OF CORRECTIONS. COUNT #3: DEFENDANT COMMITTED TO NJSP FOR 7 YEARS; MUST SERVE 3 YEARS WITHOUT PAROLE; TO RUN CONCURRENT WITH

COUNT #18. DEFENDANT TO RECEIVE CREDIT FOR TIME SERVED. PAY $75.00 SSCP AND $100.00 VCCB; PAYABLE TO DEPARTMENT OF CORRECTIONS. COUNT #22: DEFENDANT COMMITTED TO NJSP FOR 3 YEARS TO RUN CONCURRENT WITH COUNTS #18 & 22. PAY $75.00 SSCP AND $100.00 VCCB; PAYABLE TO DEPARTMENT OF CORRECTIONS. COUNTS #1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21 & 23 – DISMISSED ON MOTION OF PROSECUTOR.

( ) IT IS ORDERED THAT THE SHERIFF DELIVER THE DEFEND. TO THE APPROPRIATE CORRECTIONAL AUTHORITY.

(X) DEFENDANT RECEIVES CREDIT FOR TIME SPENT IN CUSTODY

TOT. DAYS 282 DATES 12/22/94 TO 9/29/95

( ) DEFENDANT RECEIVES GAP TIME CREDIT FOR TIME SPENT IN CUSTODY

TOT. DAYS _____ DATES

TOT. CUSTODIAL TERM 12Y 00M 000 INSTITUTION:

CARE COMMISS/CORR TOT. PROBATION: 00Y 00M

STATE OF NEW JERSEY V. CHARLES APPRENDI

SBI# 887 335B IND/ACC# 01-00046-I

TOTAL FINE $.00

TOTAL RESTITUTION $1,980.00

THE OFFENSE OCCURRED ON/AFTER 2/23/91 AN ASSESSMENT OF $50 IS IMPOSED ON EACH CONVICTED COUNT UNLESS THE BOX BELOW INDICATES HIGHER ASSESSMENT ($30 IF OFFENSE OCCURRED ON/AFTER 1/9/86 UNLESS HIGHER

ASSESSMENT NOTED) ($25 IF OFFENSE BEFORE 1/1/86)

(X) ASSESSMENT IMPOSED ON COUNT(S) 3 IS $100.00 EACH.

TOTAL VCCB ASSESS $300.00

( ) INSTALLMENT PAYMENTS ARE OF $ _____ PER _____

BEGINNING _____

1) A MANDATORY DEDR PENALTY IS IMPOSED

0 1ST DEGREE @ $3000
0 2ND DEGREE @ $2000
0 3RD DEGREE @ $1000
0 4TH DEGREE @ $750
DISORDERLY PERSONS @ $500

TOTAL DEDR PENALTY $.00

( ) COURT ORDERS THAT THAT COLLECTION OF DEDR PENALTY BE SUSPENDED UPON DEFENDANT'S ENTRY INTO A RESIDENTIAL DRUG PROGRAM FOR THE TERM OF THE PROGRAM

2) A FORENSIC LABORATORY FEE OF $50 PER OFFENSE ORDERED – OFFENSES @ $50.
TOTAL LAB FEE $.00

3) DRUGS INVOLVED:

4) A MANDATORY DRIVER'S LICENSE SUSPENSION OF ___ MO. IS ORDERED THE SUSPENSION BEGINS ___ END: ___
DRIVERS LICENSE # _____

DEFENDANT ADDRESS: _____

EYE COLOR _____ SEX _____

DATE OF BIRTH _____

( ) DEFENDANT HOLDS AN OUT-OF-STATE DRIVERS LICENSE FROM JURISDICTION _____
DRIVERS LICENSE # _____

( ) YOUR NON-RESIDENT DRIVING PRIVILEGE IS REVOKED FOR _____ MONTHS

IF OFFENSE OCCURRED ON/AFTER 02/01/93 & SENTENCE IS PROBATION OR STATE CORRECTIONS, A TRANSACTION FEE UP TO $1.00 IS ORDERED EACH OCCASION A PAYMENT OR INSTALLMENT IS MADE.

IF OFFENSE OCCURRED ON/AFTER 08/02/93 A $75 SAFE NEIGHBORHOOD SERVICES FUND ASSESSMENT IS ORDERED ON EACH CONVICTION

IF OFFENSE OCCURRED ON/AFTER 01/05/94 & SENTENCE IS PROBATION A FEE OF UP TO $25 PER MO. FOR THE PROB. TERM IS ORDERED COUNT PER MONTH _____

NAME OF FORM PREPARER

TELEPHONE #
609 451 8000

NAME (ATTORNEY)
JOSEPH D O'NEILL ESQ.

REPORTER: TAPED

REASONS

I have reviewed the presentence report and I have considered the Aggravating and Mitigating Factors under the statute, and I find that the following apply:

Aggravating Factors: 2 & 9 Mitigating Factors: 6, 7, 8

THIS WAS A NEGOTIATED PLEA AGREEMENT BETWEEN THE PROSECUTOR AND THE DEFENDANT. IN DECIDING WHETHER OR NOT TO ACCEPT THE PLEA AGREEMENT, THE COURT CONSIDERED THE NATURE AND DEGREE OF THE CRIME, THE NEED

FOR PUNISHMENT AND DETERRENCE, THE DEFENDANT'S PROSPECTS FOR REHABILITATION, THE PRESENTENCE REPORT, THE DEFENDANT'S PREVIOUS INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM, THE RECOMMENDATIONS OF THE PROSECUTOR AND THE PROBATION DEPARTMENT, THE TERMS OF THE PLEA AGREEMENT AND THE INTEREST OF THE PUBLIC. THE PLEA AGREEMENT APPEARS TO BE FAIR, AND IN THE INTEREST OF JUSTICE AND THE COURT SENTENCES THE DEFENDANT AS IS SET FORTH IN THIS JUDGMENT.

RUSHTON H. RIDGWAY, J.S.C.
JUDGE (NAME)

SEPTEMBER 29, 1995
DATE

/s/ Rushton H. Ridgway
JUDGE (SIGNATURE)

SENATE JUDICIARY COMMITTEE

STATEMENT TO

SENATE, No. 1062

STATE OF NEW JERSEY

DATED: APRIL 26, 1990

The Senate Judiciary Committee reports favorably Senate Bill No. 1062.

This bill provides that upon application of the prosecutor, a sentencing court may impose an extended term of imprisonment on a person convicted of a crime if it can be shown by a preponderance of the evidence that the crime was committed, at least in part, with ill will, hatred or bias, and with a purpose to intimidate, an individual or group of individuals because of race, religion, sexual orientation or ethnicity.

The extended terms of imprisonment could not be imposed on a person convicted under 2C:12-1a (simple assault); 2C:33-4 (harassment); 2C:33-10 (placing signs or displays implying threats of violence) or 2C:33-11 (desecrating religious or sectarian premises). If, however, it was determined that a conviction for simple assault or harassment involved ethnic intimidation, the offense would be upgraded from a disorderly persons offense to a crime of the fourth degree.

The extended term of imprisonment for a crime of the first degree is between 20 years and life imprisonment; for a crime of the second degree between 10 and 20 years; for a crime of the third degree between 5 and 10 years imprisonment and for crimes of the fourth degree up to 5 years.

This bill was prefiled for introduction in the 1990 session pending technical review. As reported, the bill includes the changes required by technical review which has been performed.

ASSEMBLY JUDICIARY, LAW AND PUBLIC SAFETY COMMITTEE

STATEMENT TO

SENATE, No. 1062

STATE OF NEW JERSEY

DATED: JUNE 7, 1990

The Assembly Judiciary, Law and Public Safety Committee reports favorably Senate Bill No. 1962.

This bill provides that upon application of the prosecutor, a sentencing court may impose an extended term of imprisonment on a person convicted of a crime if it can be shown by a preponderance of the evidence that the crime was committed, at least in part, with ill will, hatred or bias, and with a purpose to intimidate, an individual or group of individuals because of race, religion, sexual orientation or ethnicity.

The extended terms of imprisonment could not be imposed on a person convicted under 2C:12-1a (simple assault); 2C:33-4 (harassment); 2C:33-10 (placing signs or displays implying threats of violence) or 2C:33-11 (desecrating religious or sectarian premises). If, however, it was determined that a conviction for simple assault or

harassment involved ethnic intimidation, the offense would be upgraded from a disorderly persons offense to a crime of the fourth degree.

The extended term of imprisonment for a crime of the first degree is between 20 years and life imprisonment; for a crime of the second degree between 10 and 20 years; for a crime of the third degree between 5 and 10 years imprisonment and for crimes of the fourth degree up to 5 years.

This bill is identical to the Assembly Committee Substitute for Assembly Bills Nos. 3022, 2758, 2759 and 2101.

P.L. 1990, Chapter 87, *approved August 9, 1990*
1990 Senate No. 1062

AN ACT concerning ethnic intimidation and amending N.J.S. 2C:12-1, N.J.S.2C:33-4, N.J.S.2C:43-7, and N.J.S. 2C:44-3.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. N.J.S.2C:12-1 is amended to read as follows:

2C:12-1. Assault. a. Simple assault. A person is guilty of assault if he:

(1) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(2) Negligently causes bodily injury to another with a deadly weapon; or

(3) Attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense.

b. Aggravated assault. A person is guilty of aggravated assault if he:

(1) Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or

---

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined <u>thus</u> is new matter.

under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury; or

(2) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon; or

(3) Recklessly causes bodily injury to another with a deadly weapon; or

(4) Knowing under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in section 2C:39-1f., at or in the direction of another, whether or not the actor believes it to be loaded; or

(5) Commits a simple assault as defined in subsection a. (1) and (2) of this section upon

(a) Any law enforcement officer acting in the performance of his duties while in uniform or exhibiting evidence of his authority; or

(b) Any paid or volunteer fireman acting in the performance of his duties while in uniform or otherwise clearly identifiable as being engaged in the performance of the duties of a fireman; or

(c) Any person engaged in emergency first-aid or medical services acting in the performance of his duties while in uniform or otherwise clearly identifiable as being engaged in the performance of emergency first-aid or medical services; or

(d) Any school board member or school administrator, teacher or other employee of a school board while clearly identifiable as being engaged in the performance

of his duties or because of his status as a member or employee of a school board.

Aggravated assault under subsection b. (1) is a crime of the second degree; under subsection b. (2) is a crime of the third degree; under subsection b. (3) and b. (4) is a crime of the fourth degree; and under subsection b. (5) is a crime of the third degree if the victim suffers bodily injury, otherwise it is a crime of the fourth degree.

c. A person is guilty of assault by auto when the person drives a vehicle recklessly and causes either serious bodily injury or bodily injury to another. Assault by auto is a crime of the fourth degree if serious bodily injury results and is a disorderly persons offense if bodily injury results.

d. A person who is employed by a facility as defined in section 2 of P.L. 1977, c.239 (C.52:27G-2) who commits a simple assault as defined in paragraph (1) or (2) of subsection a. of this section upon an institutionalized elderly person as defined in section 2 of P.L. 1977, c.239 (C.52:27G-2) is guilty of a crime of the fourth degree.

e. A person who commits a simple assault as defined in subsection a. of this section is guilty of a crime of the fourth degree if the person acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation, or ethnicity.

(cf: P.L. 1985, c.444, s.1)

2. N.J.S. 2C:33-4 is amended to read as follows:

2C:33-4. Harassment.

[A] Except as provided in subsection d., a person commits a petty disorderly persons offense if, with purpose to harass another, he:

a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;

b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

A communication under subsection a. may be deemed to have been made either at the place where it originated or at the place where it was received.

d. A person commits a crime of the fourth degree if in committing an offense under this section, he acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

(cf: P.L. 1983, c.334, s.1)

3. N.J.S.2C:43-7 is amended to read as follows:

2C:43-7. Sentence of imprisonment for Crime; Extended Terms. a. In the cases designated in section 2C:44-3, a person who has been convicted of a crime may

be sentenced to an extended term of imprisonment, as follows:

(1) in case of aggravated manslaughter sentenced under subsection c. of N.J.S.2C:11-4 or kidnapping when sentenced as a crime of the first degree under paragraph (1) of subsection c. of 2C:13-1 for a specific term of years which shall be between 30 years and life imprisonment;

(2) Except for the crime of murder and except as provided in paragraph (1) of this subsection, in the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 20 years and life imprisonment;

(3) In the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years;

(4) In the case of a crime of the third degree, for a term which shall be fixed by the court between five and 10 years;

(5) In the case of a crime of the fourth degree pursuant to 2C:43-8c. [and], 2C:44 3d. and 2C:44-3e. for a term of five years, and in the case of a crime of the fourth degree pursuant to 2C:43-6f. for a term which shall be fixed by the court between three and five years.

b. As part of a sentence for an extended term and notwithstanding the provisions of 2C:43-9, the court may fix a minimum term not to exceed one-half of the term set pursuant to subsection a. during which the defendant shall not be eligible for parole or a term of 25 years during which time the defendant shall not be eligible for

parole where the sentence imposed was life imprisonment; provided that no defendant shall be eligible for parole at a date earlier than otherwise provided by the law governing parole.

c. In the case of a person sentenced to an extended term pursuant to 2C:43-6c., 2C:43-6f. and 2C:44-3d., the court shall impose a sentence within the ranges permitted by 2C:43-7a. (2), (3), (4) or (5) according to the degree or nature of the crime for which the defendant is being sentenced, which sentence shall include a minimum term which shall, except as may be specifically provided by N.J.S.2C:43-6f., be fixed at or between one-third and one-half of the sentence imposed by the court or five years, whichever is greater, during which the defendant shall not be eligible for parole. Where the sentence imposed is life imprisonment, the court shall impose a minimum term of 25 years during which the defendant shall not be eligible for parole, except that where the term of life imprisonment is imposed on a person convicted for a violation of N.J.S.2C:35-3, the term of parole ineligibility shall be 30 years.

(cf: P.L. 1988, c.44, s.14.)

4. N.J.S.2C:44-3 is amended to read as follows:

2C:44-3. Criteria for Sentence of Extended Term of Imprisonment.

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in this section. The court shall, upon

application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S.2C:12-1a., N.J.S.2C:33-4 or a violation of section 1 or 2 of P.L. 1981, c.282 (C.2C:33-10 or 2C:33-11), to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. If the grounds specified in subsection d. are found, and the person is being sentenced for commission of any of the offenses enumerated in 2C:43-6c., the court shall sentence the defendant to an extended term as required by 2C:43-6c., and application by the prosecutor shall not be required. The finding of the court shall be incorporated in the record.

a. The defendant is a persistent offender. A persistent offender is a person who at the time of the commission of the crime is 21 years of age or over, who has been previously convicted on at least two separate occasions of two crimes committed at different times, when he was at least 18 years of age, if the latest in time of these crimes or the date of the defendant's last release from confinement, whichever is later, is within 10 years of the date of the crime for which the defendant is being sentenced.

b. The defendant is a professional criminal. A professional criminal is a person who committed a crime as part of a continuing criminal activity in concert with two or more persons, and the circumstances of the crime show he has knowingly devoted himself to criminal activity as a major source of livelihood.

c. The defendant committed the crime as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value the amount of which was

unrelated to the proceeds of the crime or he procured the commission of the offense by payment or promise of payment of anything of pecuniary value.

d. Second offender with a firearm. The defendant is at least 18 years of age and has been previously convicted of any of the following crimes: 2C:11-3, 2C:11-4, 2C:12-1b., 2C:13-1, 1, 2C:18-2, 2C:29-5, 2C:39-4a., or has been previously convicted of an offense under Title 2A of the 2C:14-2a., 2C:14-3a., 2C:15-New Jersey Statutes which is equivalent of the offenses enumerated in this subsection and he used or possessed a firearm, as defined in 2C:39-1f., in the course of committing or attempting to commit any of these crimes, including the immediate flight therefrom.

e. The defendant in committing the crime acted, at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

(cf: P.L. 1981, c.31, s.3)

5. This act shall take effect immediately.

CRIMINAL JUSTICE

Provides for extended terms of imprisonment for offenses involving ethnic intimidation and upgrades simple assault and harassment involving ethnic intimidation.

Jan 13 2000

(3)

Supreme Court, U.S.
FILED
JAN 13 2000
OFFICE OF THE CLERK

No. 99-478

In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF OF PETITIONER

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
(856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-6181

Counsel for Petitioner

January 13, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

60PP

QUESTION PRESENTED

Whether New Jersey violates Fifth Amendment Due Process rights and Sixth Amendment guarantees of notice and jury trial by providing that a defendant's maximum punishment may be increased from ten to twenty years based solely upon a finding by a sentencing judge under a preponderance of the evidence standard, without notice by indictment and jury trial, that the defendant had the requisite intent necessary to establish a "hate" crime.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case.

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OPINIONS BELOW

The opinion of the New Jersey Supreme Court and the dissent thereto (Pet. App. 1a-66a) were entered on June 24, 1999, and are reported at 159 N.J. 7, 731 A.2d 485 (1999). The opinion of the Superior Court of New Jersey, Appellate Division and the dissent and concurrence thereto (Pet. App. 67a-94a) were entered on August 19, 1997, and are reported at 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997). The oral opinion of Superior Court, Law Division, Judge Rushton Ridgway and transcript of motion and sentencing are attached in the Appendix hereto at Pet. App. 95a to 163a.

JURISDICTION

The New Jersey Supreme Court entered its judgment on June 24, 1999. Petitioner Charles C. Apprendi, Jr. timely filed a petition for certiorari on September 17, 1999. This Court granted the petition on November 29, 1999. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service

in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

N.J. Stat. Ann. § 2C:44-3. Criteria for Sentence of Extended Term of Imprisonment.

The court may, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime of the first, second or third degree to an extended term of imprisonment if it finds one or more of the grounds specified in subsection a., b., c., or f. of this section. The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S.A. 2C:12-1a., N.J.S.A. 2C:33-4, or a violation of N.J.S.A. 2C:14-2 or 2C:14-3 if the grounds

for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e. . . .

. . . .

e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

STATEMENT OF THE CASE

This case squarely presents constitutional issues addressed, but not conclusively resolved, in *Jones* v. *United States*, 119 S.Ct. 1215 (1999): the constitutional limitations upon legislative authority to specify how, and by whom, critical facts are determined in a criminal case. The specific issue here is whether a state legislature can require that a judge will decide, by a mere preponderance of the evidence, a defendant's mental state during the conduct at issue, and thereby dramatically increase his or her maximum sentence. The New Jersey statute in question here, N.J. Stat. Ann. § 2C:44-3e., expressly provides that the judge, not the jury, shall decide whether the hate crime statute applies by assessing the evidence under a preponderance of the evidence standard rather than the beyond a reasonable doubt standard. This statute requires the judge to determine the purpose or mental state with which the defendant committed the predicate

act. In this case, such a finding doubled the maximum sentence exposure from ten to twenty years.

It is equally important to emphasize what issues are not addressed in this case. This case is not a challenge to New Jersey's ability to make criminally liable those persons who engage in hate crimes. Nor is it a challenge to the State's ability to define the facts whose proof is essential in order to obtain convictions of those whose conduct constitutes what the State defines as a "hate crime." Instead, this case concerns the constitutionality of the procedures used to establish such liability. Put simply, it is about whether, as the United States Constitution demands, the facts which constitute such crimes are to be determined, after fair notice and beyond a reasonable doubt, by the fact-finding judgment of a jury or, as was the case here, a state may relegate that question to the individual discretion of a judge using the minimum possible standard of proof.

In 1990 the New Jersey Legislature enacted the "Ethnic Intimidation Act," L. 1990, c. 282 ("the Act"), to expand the State's preexisting hate crime statute, L. 1981, c. 282. The Act created aggravated forms of assault and harassment where a defendant acts with a biased purpose in selecting a victim (elevating a disorderly persons offense for assault and a petty disorderly persons offense for harassment to crimes of the fourth degree). See N.J. Stat. Ann. § 2C:12-1e., 33-4d. More importantly, the Act added a blanket provision, N.J. Stat. Ann. § 2C:44-3e., requiring an extended term of imprisonment for other crimes of the first, second, or third degree where "the defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals

because of race, color, gender, handicap, religion, sexual orientation or ethnicity." This has the effect in Petitioner's case, and in many other cases, of doubling the maximum sentence for the primary offense.[1] N.J. Stat. Ann. § 2C:44-3e. effectively gives to the judge, rather than the jury, the responsibility to determine whether an individual committed a hate crime, and it directs the judge to make that determination based on a mere preponderance of the evidence.

On December 22, 1994, Petitioner Charles Apprendi, Jr. ("Petitioner"), a thirty-seven year old pharmacist and first-time offender, was arrested for shooting at the home of one of his neighbors. Mr. Apprendi is white; the neighbors are black. He ultimately negotiated a plea agreement whereby he pled guilty to two counts of possession of a firearm for an unlawful purpose (for the December 22 incident and one previous incident), a second degree crime, N.J. Stat. Ann. § 2C:39-4a., and to one count of unlawful possession of a prohibited weapon, N.J. Stat. Ann. § 2C:39-3a., a third degree crime. Under the terms of the plea agreement, the State reserved the right to seek an extended sentence under N.J. Stat. Ann. § 2C:44-3e. for the December 22 shooting incident, and Petitioner reserved the right to challenge the constitutionality of that section.

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[1] Petitioner's primary crime (possession of a weapon for an unlawful purpose) would ordinarily be subject to a prison term of between 5 and 10 years. *See* N.J. Stat. Ann. § 2C:39-4a., 43-6a.(2). Under N.J. Stat. Ann. § 2C:44-3e., the maximum and minimum sentence for Petitioner's second degree offense doubles to between 10 and 20 years. *Compare id. with* N.J. Stat. Ann. § 2C:43-7a.(3).

The shooting at issue occurred at approximately 2:04 a.m. on December 22, 1994. At approximately 3:05 a.m. that same morning Petitioner confessed to Vineland Police that he had fired approximately four or five rounds from a .22 caliber rifle at the house. No written or recorded oral statement was given by Petitioner, but an officer did testify at a plenary hearing before the trial court that at approximately 6:04 a.m. Petitioner "told me he fired shots at the home because there were black people living there." (Pet. App. 175a, 250a.) Defendant's psychological infirmities were explored in a September 5, 1995 plenary hearing, at which time Judge Rushton Ridgway heard testimony from Clinical and Forensic Psychologist Gerald Cooke, character witnesses, and Defendant Charles Apprendi. Dr. Cooke opined that the Petitioner shot at the house because he suffered from an impulsive destructive disorder brought about when the front door of the house caught his attention because it was purple with a big pane of glass.

Petitioner appeared at a plenary hearing before Judge Ridgway on September 5, 1995 to determine his state of mind at the time of the shooting. (Pet. App. 164a-301a.) At the hearing, Petitioner presented evidence to suggest that he did not have the requisite purpose or intent necessary to support a finding that he had violated the hate crime statute. He presented the testimony and affidavits of several character witnesses, black and white, who testified that Mr. Apprendi regularly interacted with and socialized with African-Americans and did not have a reputation among his family, friends, and acquaintances for racially prejudiced attitudes, statements, or actions. (Pet. App. 183a-205a.)

Petitioner denied that he had acted out of racial bias (Pet. App. 242a) or that he harbored any racist views. (Pet. App. 245a.) He testified that he had had several vodka and tonic drinks in the hours prior to the shooting incident and that he had taken a number of prescription medications earlier that day and evening: "a couple" of Lomotil (a prescription medication for stomach problems), one Dilaudid (an opiate), and several Ativans (tranquilizers). (Pet. App. 238a-239a.) He testified that the combined effects of the drugs, alcohol and physical exhaustion left him "dizzy" and "out of it," "like a – a stoned drunk," intoxicated, even if he did not appear so. (Pet. App. 249a.) Immediately after the shooting incident he felt "strange," as if he were "in a cloud somewhere." (Pet. App. 237a.)

Mr. Apprendi testified that the interrogating officer first mentioned race during the interrogation (Pet. App. 241a) and that he gave a false confession to the officer because he was irrational and scared. (Pet. App. 242a.) He testified that the interrogating officer tried to intimidate him by telling him that there were "a lot of homosexuals and AIDS in jail" and a large prison population of blacks who would assault him when they discovered the nature of his crime. Petitioner testified that the officer promised that if he (Apprendi) cooperated, the officer would try to make it easier on him. (Pet. App. 242a-243a.) As to the shooting, Mr. Apprendi testified that he fired at his neighbors' front door because the glass and purple door attracted his attention, sparking an urge to destroy it. (Pet. App. 251a.)

The defense presented the unrebutted testimony of Dr. Cooke, who had examined Mr. Apprendi on February 15, 1995 and given him a battery of personality and psychological tests. Dr. Cooke testified that Petitioner told him that he shot at the door because he was drunk and drug-intoxicated, and the door caught his attention because it was purple and had a large plate of glass. (Pet. App. at 210a-211a.) Dr. Cooke opined that this type of behavior was consistent with Petitioner's obsessive-compulsive personality disorder and alcohol abuse. (Pet. App. 216a, 234a.)

Dr. Cooke diagnosed that Petitioner suffers from an obsessive compulsive disorder, which includes anxiety, gastrointestinal symptoms, kleptomania, loss of control of anger impulses, depression, and drug and alcohol abuse. (Pet. App. 216a-217a.) Dr. Cooke suggested that the impulse disorder of kleptomania explained Mr. Apprendi's accumulation of guns, ammunition, and various other tools and metal objects. *Id.*

Dr. Cooke further testified that his clinical examination of Petitioner revealed that he also suffered from a cyclothymic condition, similar to a bipolar disorder, where "the individual's moods go from being excited and hypomanic and elated to being depressed and lethargic." *Id.* On direct examination, Dr. Cooke testified that in the fall and winter of 1994 the Petitioner's psychological disorders and the drugs and alcohol produced a synergistic effect: "You've got the combination with an individual who is anxious and over-controlled, but who is disinhibited under the effect of those drugs and alcohol. And you've got an individual who when he becomes emotional also shows interference. So all three factors really

combine into fear of [sic] judgment and reasoning and impulse control."[2] (Pet. App. 218a.)

With respect to Mr. Apprendi's purported confession during the interrogation that he shot at the house because a black family was living there, Dr. Cooke testified as follows:

> Here we have a very anxious man. One who feels very vulnerable. One who feels very inadequate. And one who would say or do just about anything to get out of a frightening anxiety-arousing situation.
>
> Q. Even tell a lie?
>
> A. Tell somebody a lie if it was what he thought that person wanted to hear in order to stop the interrogation and let him out of the situation. . . . I'm only saying that he has the kind of personality of an individual who would do that to get out of this kind of situation. (Pet. App. 219a.)[3]

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[2] There appears to be an error in the transcript here. To make sense, the sentence should read: "So all three factors really combine *to interfere with* judgment and reasoning and impulse control."

[3] Later, during cross examination, Dr. Cooke explained further that "his personality is consistent with an individual who is an interrogation situation where his anxiety would be aroused in the kind of person that would just – you know, in his own mind he'd be saying to himself, 'I've got to tell them whatever they want to hear so I can get out of this.' " (Pet. App. 224a-225a.)

At the plenary hearing and sentencing,[4] the prosecution submitted the following evidence to the court: the testimony of the officer who interrogated Mr. Apprendi immediately following his arrest (who testified that the police did not attempt to coerce Mr. Apprendi or to suggest to him the racial bias motive (Pet. App. 286a), that Mr. Apprendi appeared lucid during the interrogation (Pet. App. 284a), and that he orally admitted shooting at the house on two instances because black people lived there (Pet. App. 176a)); and the testimony of Mr. Michael Fowlkes (the homeowner). Mr. Fowlkes testified that his family was the only black family that lived in the immediate neighborhood (Pet. App. 102a), that the home had been struck by bullets on four occasions (Pet. App. 104a-105a), and that his front door was constructed of clear glass with a six-inch burgundy border. (Pet. App. 108a.)

After hearing all the evidence, Judge Ridgway noted that the issue of racial motivation "is one which the legislature has left to the discretion of the Court" to be determined by a "preponderance of the evidence." (Pet. App. 139a.) As to Petitioner's particular mental state, Judge Ridgway declared:

> And the Court also takes into consideration that, as I said before, I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias, would not have

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[4] At the request of the prosecutor, the court permitted the owner of the home to testify at Petitioner's sentencing on September 29, 1997.

> manifested itself, except for the psychiatric problem that he has. (Pet. App. 160a.)

This statement makes unclear whether Judge Ridgway would have found Petitioner guilty of the hate crime had the standard of proof been beyond a reasonable doubt. What is clear is that Judge Ridgway invoked this enhanced penalty by a standard of mere preponderance of the evidence. After summarizing the evidence for and against a finding of a racially biased purpose, (Pet. App. 139a-144a), Judge Ridgway ultimately concluded that the standard of proof had been met. (Pet. App. 144a.) Accordingly, he applied the hate crime enhancement and sentenced Petitioner to twelve years of incarceration on the first firearm count, with a four-year period of parole ineligibility; seven years on the remaining firearm count; and three years on the prohibited weapons count, with the sentences to run concurrently. (Pet. App. 161a.)

Mr. Apprendi appealed his enhanced sentence under N.J. Stat. Ann. § 2C:44-3e., on the grounds that it was unconstitutionally vague and violated his constitutional right to due process by permitting a judge to determine his state of mind based on a preponderance of the evidence. (Pet. App. 82a.) The Superior Court of New Jersey, Appellate Division, affirmed the enhanced sentence. *New Jersey* v. *Charles Apprendi, Jr.*, 698 A.2d 1265 (N.J. Super. Ct. App. Div. 1997) (Pet. App. 67a-94a). The Appellate Division held that since the New Jersey legislature had not defined the "purpose to intimidate" as an element of the crime, the State did not have to prove it beyond a reasonable doubt. (Pet. App 87a.) The Appellate Division drew a substantive distinction between "motive" and "intent" and concluded that N.J. Stat. Ann. § 2C:44-3e.

merely addressed motive – a traditional sentencing element under New Jersey law.[5] (Pet. App. 89a-93a.)

In a dissenting opinion, Judge Wecker observed that the definition of "element" in the New Jersey Code of Criminal Conduct itself, as well as the historical treatment of a defendant's mental state, dictated that the "purpose to intimidate" described in N.J. Stat. Ann. § 2C:44-3e. be treated as an "element" subject to the constitutional requirements of a jury determination and proof beyond a reasonable doubt. (Pet. App. 71a-75a.) She concluded that "[t]he State's power to define away the elements of the crime cannot extend . . . to defining away the actor's culpable purpose as an element of the crime – a crime for which this defendant received a sentence beyond the ordinary term for a second degree offense." (Pet. App. 70a.)

The Supreme Court of New Jersey affirmed the decision of the Appellate Division in *New Jersey* v. *Charles Apprendi, Jr.*, 304 N.J. Super. 147, 731 A.2d 485 (N.J. 1999) (Pet. App. 1a-66a.) The court applied the five-factor test culled from *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), and concluded that the "hate-crime enhancer" in N.J. Stat. Ann. § 2C:44-3e. approximates the "visible possession of a firearm" sentencing factor in *McMillan* in all respects except that it alters the maximum penalty for the underlying crime. (Pet. App. 20a-21a). The court did not find the increase in the maximum penalty significant in

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[5] The Court rejected the vagueness argument based on prior precedent and recent amendments to the statute, made prior to Apprendi's sentence, that remedied the alleged vagueness.

light of this Court's decision in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), which it believed to be controlling. (Pet. App. 19a-20a, 22a.) The court suggested that N.J. Stat. Ann. § 2C:44-3e. actually *helped* criminal defendants by excluding evidence of bias that would otherwise inflame the jury. (Pet. App. 24a.) Nevertheless, the court recognized that its holding was necessarily tentative because "the final word on this subject will have to come from the United States Supreme Court." *Id.*

Two Justices dissented, concluding that the determination that "a defendant's mental state in committing the subject offense encompassed a purpose to intimidate because of race, necessarily involves a finding so integral to the charged offense that it must be characterized as an element thereof." (Pet. App. 30a.) The dissent emphasized that N.J. Stat. Ann. § 2C:44-3e., unlike the recidivism at issue in *Almendarez-Torres* and the serious bodily harm at issue in *Jones*, involves the conduct of a criminal defendant, specifically, his or her purpose in committing the charged offense. (See Pet. App. 60a (citing *Jones*, 119 S.Ct. at 1238 (Kennedy, J., dissenting)).) The dissent further noted that *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), which upheld the visible possession of a firearm as a sentencing factor, did not "require[ ] the sentencer to make findings of fact, such as are required by N.J. Stat. Ann. § 2C:44-3e., about the mental state of a defendant when he committed the subject offense." (Pet. App. 64a.). Finally, the dissent noted that the majority's concern about inflaming the jury could be readily addressed by bifurcating the charges, a practice followed in New Jersey in other instances, such as capital cases.

SUMMARY OF ARGUMENT

The New Jersey Supreme Court erred when it concluded that the "penalty enhancement" provision in N.J. Stat. Ann. § 2C:44-3e. does not offend the Constitution. The decision should be reversed. Where, as here, the determination of a criminal defendant's mental state can increase the maximum penalty for a crime, the Constitution requires that the determination be made by a jury and proven beyond a reasonable doubt. New Jersey cannot avoid the requirements of the Fifth and Sixth Amendments by merely defining the fundamental element of its hate crime statute as a sentencing factor.

ARGUMENT

I. BEFORE DOUBLING A STATUTORY MAXIMUM SENTENCE FROM TEN YEARS TO TWENTY YEARS ON THE BASIS OF A DEFENDANT'S MENTAL STATE, THE PROSECUTION MUST PROVE THE EXISTENCE OF THAT MENTAL STATE BEYOND A REASONABLE DOUBT TO A JURY.

A. Under The Due Process Clause Of The Fifth Amendment And The Notice And Jury Trial Guarantees Of The Sixth Amendment Any Fact (Other Than Recidivism) Including A Defendant's Mental State, That Increases The Maximum Penalty For A Crime Must Be Charged In An Indictment, Submitted To A Jury And Proven Beyond A Reasonable Doubt.

The New Jersey statute at issue here imposes upon the defendant charged with a "racially biased crime"[6] both a substantially lengthened imprisonment and the stigma of bigotry on the slimmest burden of proof recognized in American jurisprudence – a preponderance of the evidence. This is not sustainable.

N.J. Stat. Ann. § 2C:44-3e. violates the due process protections guaranteed by the Fifth Amendment. The Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The justification for this principle is clear:

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[6] Primarily for purposes of convenience, but also because the case before the Court involves alleged racial bias, we will refer to the *mens rea* involved as "racial bias," although the reach of the statute includes other prejudicial purposes as well.

The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law." *Coffin* v. *United States*, [156 U.S. 432, 453 (1895)]. . . .

Moreover, use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt without utmost certainty.

Id.

N.J. Stat. Ann. § 2C:44-3e. violates both the spirit and letter of *Winship*. It threatens to "dilute the force of the criminal law" by subjecting defendants to harsh criminal penalties, over and above those imposed for the underlying offense, without affording them the protections of the reasonable doubt standard. It does so by labeling the essential element of the New Jersey hate crime law – the "purpose to intimidate . . . because of race" – a penalty enhancement provision rather than an element of an

aggravated crime. This places a crucial factual determination, the defendant's state of mind at the time of the offense, in the hands of a judge to be determined by a mere preponderance of the evidence. The decisive issue in this case is whether, in so doing, New Jersey can avoid the constitutional requirements that would otherwise attach to a determination of a defendant's mental state. It cannot.

Although states generally have the authority to define crimes and prescribe penalties, see *McMillan* v. *Pennsylvania*, 477 U.S. 79, 86 (1986), requirements of due process may not be evaded by merely redefining "the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney* v. *Wilbur*, 421 U.S. 684, 698 (1975); *accord Patterson* v. *New York*, 432 U.S. 197, 210 (1977) (recognizing that there are "obviously constitutional limits beyond which the States may not go" in reallocating burdens of proof by labeling elements of crimes as affirmative defenses).

Recently, the Court stated the following principle: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, *any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.*" *Jones* v. *United States*, 119 S.Ct. 1215, 1224, n. 6 (emphasis added). Although the Court articulated this standard as a means of casting doubt on the Government's proposed interpretation of the carjacking statute, it reflects the Court's most recent pronouncement on the issues squarely presented by this appeal, and it

reiterates the Court's commitment to the principles established in *Winship*.

Under the standard articulated in *Jones*, N.J. Stat. Ann. § 2C:44-3e. cannot pass constitutional muster, as it manifestly "increases the maximum penalty for a crime" based on a judge's determination of a crucial fact under a mere preponderance of the evidence standard. New Jersey's statute, even more clearly than the statute in *Jones*, includes language that this Court held to constitute elements of an offense rather than mere sentencing considerations. *Id.* at 1218-1222. N.J. Stat. Ann. § 2C:44-3e. "not only provide[s] for steeply higher penalties, but condition[s] them on further facts that seem quite as important as the elements in the [principal offense]." *Id.* at 1218. The "hate" element of a hate crime cannot reasonably be characterized as a mere sentencing consideration; it is the essence of the crime itself.

The additional penalty imposed by N.J. Stat. Ann. § 2C:44-3e. is two-pronged: a criminal defendant can be branded as a racist and be imprisoned for twice as long as otherwise permitted by law.[7] Thus, the determination of a defendant's mental state greatly increases both the stigma

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[7] This statute permits the judge to effectively increase the degree of a particular offense. Thus, Petitioner, who pled guilty to a second degree offense (with a 10-year maximum sentence), could have been sentenced at the first degree level (up to 20 years). If he had been convicted of a first degree offense, his maximum sentence would have increased from 20 years to life imprisonment. *Accord Jones*, 119 S.Ct. at 1224 ("[A] jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.").

associated with the crime and the maximum length of incarceration. Such a determination should not be made without the protections afforded by the reasonable doubt standard. See *McMillan*, 477 U.S. at 103 ("[I]f a State provides that a specific component of a prohibited transaction give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*.") (Stevens, J., dissenting).

Ever since its decision in *Winship*, this Court has repeatedly held that a higher standard of proof than that "necessary to award money damages in an ordinary civil action," *Santosky* v. *Kramer*, 455 U.S. 745, 747 (1982), must be applied in situations creating grave and permanent injury to a citizen. Since *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) the Court has held that a higher standard than preponderance (the "clear and convincing" standard) must be applied in proceedings involving civil commitment, deportation, denaturalization, and the termination of parental rights. See, *e.g.*, *Addington* v. *Texas*, 441 U.S. 418, 427 (1979) (civil commitment proceedings); *Woodby* v. *INS*, 385 U.S. 276, 286 (1966) (deportation proceedings); *Chaunt* v. *United States*, 364 U.S. 350, 353 (1960) (denaturalization proceedings); *Santosky* v. *Kramer*, 455 U.S. 745, 769 (1982) (termination of parental rights). See also *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999). If a preponderance of evidence standard was inadequate to protect the interests at stake in these civil proceedings, then a preponderance standard clearly is inadequate here, where a defendant faces doubled criminal sanctions. The application of each of the *Mathews* factors would, at a minimum, require the application of something more

than a preponderance of evidence where a defendant is subjected to both a greater stigma and a greater maximum sentence. Under *Mathews* and its progeny, N.J. Stat. Ann. § 2C:44-3e. plainly is inadequate.[8]

This Court explained in *Rivera* v. *Minich*, 483 U.S. 574, 581 (1987), why a higher standard is appropriate: "[B]ecause an adverse ruling in a criminal, civil commitment or termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings." See also *Addington* v. *Texas*, 441 U.S. 418, 423 (1979) ("In a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.").

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[8] Petitioner has identified only one other state statute that increased a maximum sentence based upon a finding by a court of a defendant's purpose, and that statute was held unconstitutional by the state's highest court. In *People* v. *Hernandez*, 757 P.2d 1013 (Cal. 1988) the defendant was charged with kidnapping. The trial court, at sentencing, imposed a three-year additional sentence pursuant to § 667.8 of the California Penal Code, which allowed such an increase if the kidnapping was "for the purpose of committing a sexual offense." The California Supreme Court held the additional sentence unconstitutional because the statute had not been pled or proven at trial. The Court declared: "[T]he reference to mere motive . . . downgrades the importance of the mental element required by the statute and would be inconsistent with the construction given to similar language in other penal statutes." *Id.* at 1016.

B. Assessing A Defendant's Mental State Presents A Task Fraught With Uncertainty; The Risk Of Error Requires Proof Beyond A Reasonable Doubt.

The uncertainty inherent in assessing a criminal defendant's "purpose" or intent necessitates a higher standard of proof. This Court has recently reaffirmed the centrality of mental state – and of mental states generally – to the criminal law. In *Staples* v. *United States*, 511 U.S. 600, 605-06 (1994), and again in *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 71 (1994), the Court explained that the *mens rea* element is so firmly rooted in our traditions that it is presumed where a statute, by its terms, does not include it.

The primary function of a standard of proof is "to minimize the risk of erroneous decisions." *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 13 (1979). As the Court explained in *Addington*, the purpose of a standard of proof is "to instruct the fact finder concerning the degree of confidence our society thinks he should have in the correctness of the factual conclusions for a particular type of adjudication." 441 U.S. at 423; see also *Mathews*, 424 U.S. at 344. Thus, the reasonable doubt standard reflects society's desire to minimize error in assigning criminal guilt. As Justice Harlan stated in his concurring opinion in *Winship*, the reasonable doubt standard in criminal cases is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." 397 U.S. at 372.

The facts of this case exemplify the difficulties inherent in – and the risks of error associated with – determining a defendant's mental state. It is undisputed that Mr. Apprendi was intoxicated when he fired his gun at his neighbors' purple door. Moreover, substantial evidence was submitted at the sentencing hearing to suggest that he suffered from psychological difficulties. Judge Ridgway conceded as much during the hearing:

> I'm satisfied the defendant has a psychiatric problem. And I'm satisfied, quite frankly, that this racial bias would not have manifested itself except for the psychiatric problem that he has. . . . I'm satisfied that [these acts] represent an aberration. (Pet. App. 160a-161a.)

This declaration by the trial judge who sentenced the petitioner shows that his acts were undoubted affected by his psychiatric turmoil. These circumstances suggest the difficulty of the factual inquiry into Petitioner's state of mind. Judge Ridgway was required to subjectively weigh competing evidence and to balance facts and inferences against each other:

> THE COURT: Very well. Gentlemen, as you're very well aware the statute which we're talking about, 2C:44-3, provides for an enhanced penalty when the Court is satisfied by a preponderance of the evidence that the actions of a defendant are motivated by racial bias. (Pet. App. 138a.)

Because Judge Ridgway utilized the preponderance of evidence standard of proof, he may well have reached

a different conclusion had he been required to determine the defendant's "purpose" beyond a reasonable doubt.

We submit that had the trial judge required the State to show racial bias beyond a reasonable doubt, the Court might well have concluded that the State had failed to carry its burden that Mr. Apprendi's actions were motivated by racial bias, and not by other mental infirmities. We do know that the trial court decided the mental state of the petitioner by the civil standard of mere preponderance of the evidence.

Petitioner respectfully contends that ascertaining any defendant's mental state, particularly one like Mr. Apprendi, who was mentally disabled by an obsessive compulsive disorder and drug and alcohol abuse at the time he committed the predicate crimes, is rife with peril and should be decided by a jury upon proof beyond a reasonable doubt.

In *Culombe* v. *Connecticut*, this Court wrote:

> [D]etermination of how the accused reacted to the external facts, and of the legal significance of how he reacted – although distinct as a matter of abstract analysis, become[s] in practical operation inextricably interwoven. This is so, in part, because the apprehension of mental states is almost invariably a matter of induction, more or less imprecise, and the margin of error which is thus introduced into the finding of "fact" must be accounted for in the formulation and application of the "rule" designed to cope with such classes of facts.

367 U.S. 568, 604 (1961).

This uncertainty in the factual determination distinguishes N.J. Stat. Ann. § 2C:44-3e. from the sentencing provisions at issue in *McMillan* and *Almendarez-Torres*, 523 U.S. 224 (1998). The Pennsylvania statute at issue in *McMillan* provided an enhanced minimum sentence (the maximum sentence remained unchanged) for certain enumerated felonies where the sentencing judge determined by a preponderance that the defendant "visibly possessed a firearm." 477 U.S. at 81. In upholding this statutory scheme, the Court was careful to observe that "the risk of error in the context of a 9712 proceeding is comparatively slight – visible possession is a simple, straightforward issue susceptible of objective proof." *Id.* at 84.[9] Similarly, in *Almendarez-Torres*, the risk of error in ascertaining whether a defendant has a prior criminal record was remote, and the Court repeatedly emphasized the unique nature of recidivism as a sentencing factor. 523 U.S. at 243-244. Unlike the determination of a defendant's mental state, recidivism involves the mechanistic determination of whether a criminal defendant had any prior convictions by simply reading the criminal record or rap sheet. It involves no discretion or measured judgment, careful weighing of the facts and inferences (roles typically assigned to a jury rather than a judge), and it is

[9] *McMillan* is distinguishable on other grounds as well. In *McMillan*, the Court emphasized that the case did not transgress constitutional limits because it did not "alter the maximum penalty for a crime" but merely "limit[ed] the sentencing court's discretion in selecting a penalty within the range already available to it . . . . " *Id.* at 87-88. By contrast here, N.J. Stat. Ann. § 2C:44-3e. doubles the possible maximum penalty for a crime, greatly increasing the range of possible sentences.

objectively verifiable. The Court also qualified its holding with the telling statement that (because defendant admitted his recidivism and would have received a sentence enhancement regardless of the burden of proof): "[W]e express no view on whether some heightened standard of proof might apply to sentencing determinations that bear significantly on the severity of the sentence." *Id.* at 248. See also *United States* v. *Hopper*, 177 F.3d 824 (9th Cir. 1999) (holding that whenever there is an extreme increase in a sentence, even within the sentencing guidelines, the standard of proof should not be preponderance); cf. *United States* v. *Kikumura*, 918 F.2d 1084, 1102 (3d Cir. 1990) (employing a clear and convincing evidence standard when the sentence was increased from three years to thirty, still within the maximum).

C. New Jersey's Approach Is Unusual And Extreme.

1. Only New Jersey Expressly Uses A Preponderance Of The Evidence Determination Of A Defendant's Mental State To Effectively Double The Maximum Punishment.

In determining whether a higher standard of proof should be required, this Court has looked to the practice in other states. See, *e.g.*, *Rivera* v. *Minnich*, 483 U.S. 574, 578-79 (1987). In Appendix A, petitioner has included a survey of all state statutes that appear to be relevant to the issue of "hate" crimes and the requisite procedural protections.[10]

[10] Petitioners include in Appendix A all state statutes which appear to be relevant to this issue. In the vast majority of

Appendix A identifies fifty-four statutes from forty-two states (including the District of Columbia) which

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statutes, (*e.g.*) the statute clearly enunciates a separate crime, which requires proof beyond a reasonable doubt of the racial intent. In a number of other instances, the statute is not clear whether the racial intent must be proved by such a standard. Petitioners note that the Wisconsin statute involved in *Mitchell* v. *Wisconsin* expressly declares that the finder of fact is to determine racial bias beyond a reasonable doubt in a special verdict. Thus, even if Wisconsin's statute creates a "sentence enhancer," rather than an "element," that state has expressly addressed this issue, and resolved it consonant with the long-standing history discussed in the text. Moreover, the Wisconsin statute is the one used by the Anti Defamation League as its model for proposed legislation. *See* B'Nai B'Rith Anti-Defamation League 1999 *Hate Crimes*, p. 19. Finally, while some statutes appear to address the issue as a "sentence enhancer", these statutes are ambiguous on the standard of care to be applied. Petitioner's Appendix, attached to this brief, describes all relevant state racial bias statutes. Petitioners have located over two hundred statutes that might be considered "hate crime" statutes. Many of these, however, are aimed at conduct targeting specific places, without regard to the specific mental state impelling the act (*e.g.*, desecration of religious buildings, cemeteries, etc). (For example, Oklahoma Statutes Annotated, § 1765 states as follows: "Any person who willfully breaks, defaces or otherwise injures any house of worship or any part thereof, any appurtenance thereto, or any book, furniture, ornament, musical instrument, article of silver or plated ware, or other chattel kept therein for use in connection with religious worship shall be guilty of a felony.") Moreover, none of these statutes specifies that the purpose for which the desecration is done is relevant in any way. While one might easily speculate that desecration of a mosque or synagogue implies religious bias, the statutes do not make such bias relevant. We have, therefore, not included these statutes in our survey. Many states provide generally that anyone intentionally interfering with the civil rights of another, or assaulting them because of their

seem to use racial (or religious or gender or sexual) bias as a relevant factor. (Several states have each kind of

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exercise of their civil rights, commits a crime. We have also not included these statutes in the survey, although they also would seem to require proof beyond a reasonable doubt of the intent to act because of the civil rights of the victim.

The free standing statutes establish a new crime with a new penalty for a specific conduct and mental state. A variation on this theme establishes a new crime of "assault" or "harassment" or some other conduct "because of bias" and increases the penalty for the predicate crime. New Jersey itself has two of these statutes, N.J. Stat. Ann. § 2C:12-1e. and N.J. Stat. Ann. § 2C:33-4d.

We have assumed that the free standing statutes would require the prosecutor to prove, beyond a reasonable doubt to a jury, the specific *mens rea* indicated in the statute. In a few instances, there is case law so indicating, but most of the statutes are silent on this point, and there is no case law one way or the other.

The case before the Court involves the other kind of statute – an enhancement statute. These statutes allow increased punishment based upon bias motivation. We have found twenty-four statutes that appear to qualify under this label. Of these, eight permit racial bias to allow an increase only within the maximum sentence. One of these – Kansas – expressly uses a "clear and convincing evidence" standard. Sixteen allow an increase in the maximum sentence. Of the remaining 16, however, five (D.C., Florida, Mississippi, Rhode Island and Wisconsin) expressly require proof beyond a reasonable doubt of that motivation, and case law in another two (California and Pennsylvania) seems to require such a standard. The rest are silent on the standard of proof to be invoked, but few allow an increase anywhere near the magnitude of New Jersey. Vermont, for example, allows an increase of crimes punished by less than 5 years imprisonment, but if the underlying offense is itself punishable by more than five years, racial bias may not increase the maximum sentence.

statute, or, in some instances, several separate free standing statutes. See California, Connecticut, Illinois, Montana, Nevada, New Jersey, Rhode Island and West Virginia.) These statutes are fairly separated into two categories: (1) free stand and (2) enhancement.

The free standing statutes establish a new crime with a new penalty for a specific conduct and mental state. (For example, Idaho Code § 18-7902 states that a person is guilty of . . . "malicious harassment" if that person "maliciously and with the specific intent to intimidate or harass another person because of that person's race, color, religion, ancestry or national origin," harms or threatens to harm him. Malicious harassment is punishable by up to five years imprisonment. § 18-7903.) A variation on this theme establishes a new crime of "assault" or "harassment" or some other conduct "because of bias" and increases the penalty for the predicate crime. New Jersey itself has two of these statutes, N.J. Stat. Ann. §§ 2C:12-1e. and 2C:33-4d.[11]

Only three states, North Carolina, Texas and New Jersey, expressly invoke a standard less than beyond a reasonable doubt. North Carolina's increase applies only *within* the maximum sentence, and Texas' statute applies only to lesser misdemeanors, not to felonies. Even then, the Texas statute requires "an affirmative finding" of racial bias, which has been interpreted as requiring "relevant and reliable" evidence. *Martinez* v. *State*, 980 S.W. 2d 662, 667 (Tex. App. 1998).

Thus, no state except New Jersey expressly allows an increase of double the sentence (or more) based upon a standard less than beyond a reasonable doubt, whether that finding is made by judge or jury.

[11] Presumably, free standing statutes would require the prosecutor to prove, beyond a reasonable doubt to a jury, the

The instant case involves the other category of statute – "enhancements." These statutes allow increased punishment based upon bias motivation. Twenty-four state statutes appear to fit within this category. Of these, eight permit racial bias to allow an increase only within the maximum sentence. One of these – Kansas – expressly uses a "clear and convincing evidence" standard. Sixteen allow an increase in the maximum sentence. Five of these sixteen (D.C., Florida, Mississippi, Rhode Island and Wisconsin), expressly require proof beyond a reasonable doubt of that motivation, and case law in another two (California and Pennsylvania) seems to require such a standard. Six of the nine remaining are silent on the standard of proof to be invoked, but few allow an increase anywhere near the magnitude of New Jersey. Vermont, for example, allows an increase in the maximum sentence only for crimes punished by less than 5 years imprisonment, but if the underlying offense is itself punishable by more than five years, racial bias may not increase the maximum sentence.

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specific *mens rea* indicated in the statute. In a few instances, there is case law so indicating, but most of the statutes are silent on this point, and there is no case law one way or the other.

662, 667 (Tex. App. 1998). Thus, no state except New Jersey expressly allows an increase of double the sentence (or more) based upon a standard less than beyond a reasonable doubt, whether that finding is made by judge or jury.

Ironically, New Jersey itself appears to recognize the need for proof beyond a reasonable doubt in charges of racial bias. New Jersey's Code of Criminal Justice defines two specific offenses – one involving racial harassment (N.J. Stat. Ann. § 2C:33-4d.), the other racial assault (N.J. Stat. Ann. § 2C:12-1e.) – that require proof of racial bias beyond a reasonable doubt. In stark contrast to N.J. Stat. Ann. § 2C:44-3e., conviction for one of these aggravated offenses far less seriously increases the possible punishment (from either thirty days or six months to eighteen months under N.J. Stat. Ann. § 2C:43-6). Thus, New Jersey seems to have it backwards: it requires a stringent burden of proof for moderate penalties and a moderate burden of proof for stringent penalties.

2. The Federal Sentencing Guidelines Recognize That The Determination Of A Biased Purpose In The Commission Of A Crime Calls For The Highest Standard Of Proof.

That racial bias is strikingly different from virtually every factor that increases a sentence has been recognized not only by the vast majority of states, but also by Congress. In 1994 Congress enacted Pub. L. 103-322, § 280003 of which instructed the Federal Sentencing Commission to increase the base offense level three levels (essentially an increase, within the maximum statutory sentence, of

1½-2 years), but only if "the finder of fact at trial determines beyond a reasonable doubt" that the crime is a hate crime. See 28 U.S.C.A. § 994, Historical and Statutory Notes. This appears to be the only time that Congress has instructed the Sentencing Commission on the standard of proof, and the only time that it has expressly required proof beyond a reasonable doubt of a factor that will not increase the statutory maximum.

II. ANY FACT THAT RESULTS IN AN INCREASE OF THE MAXIMUM SENTENCE (EXCEPT RECIDIVISM) MUST BE RESOLVED BY A JURY.

A. The Question Of Intent Can Never Be Ruled As A Question Of Law, But Must Always Be Submitted To The Jury.

N.J. Stat. Ann. § 2C:44-3e. runs afoul of this Court's pronouncement in *Jones* that the Fifth and Sixth Amendments require that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." 119 S.Ct. at 1223, fn. 6. This pronouncement is merely the culmination of a long line of cases protecting and expanding the right to a jury trial. From the moment of its creation by Athena on the Areopagus,[12] the jury has served as a bulwark against overzealous prosecutors and jaded judges. As this Court has stated, the "essential feature of a jury . . . [is] the interposition between the accused and his accuser of the common sense judgment of a group of laymen . . . . " *Williams*

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[12] Aeschylus, *The Eumenides*.

v. *Florida*, 399 U.S. 78, 100 (1970). The jury has been the embodiment of community norms – and community judgment – since at least its restoration in the England of Henry II.

Development of the role of the jury in this country – recited by this Court most recently in *Jones* – illustrates the critical role that juries play in American law. This Court has played no small role in that development. While many countries have restricted or eliminated the role of juries in their legal systems, this Court has repeatedly defended the integrity of our jury system.[13]

This Court has recently reaffirmed that juries, and not judges, must decide critical issues in a criminal case. See *United States* v. *Gaudin*, 515 U.S. 506 (1995). Indeed, *Gaudin* is intriguingly on point. In that case, the government sought to avoid a jury determination of the issue of materiality by simply labeling it as something else (just as N.J. Stat. Ann. § 2C:44-3e. seeks to remove the determination of a defendant's purpose from the jury by labeling it as a sentencing factor). In rejecting this semantic argument, the Court declared:

> The existence of a unique historical exception to this principle [trial by jury] – and an exception that reduces the power of the jury precisely when it is most important . . . would be so

[13] For example, over the past thirty years this Court has reinvigorated both the petit jury and the grand jury, even when others have argued that these institutions have become relics of the past. *See, e.g., Batson* v. *Kentucky*, 476 U.S. 79 (1986); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968).

> extraordinary that the evidence for it would have to be convincing indeed. It is not so.

Id. at 515.

The question of mental state – whether characterized as motive, purpose, or specific intent – has long been the province of juries. As this Court explained in *Morissette* v. *United States*, "[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." 342 U.S. 246, 274 (1952). The Court in *Morissette* relied heavily on this principle to reverse the lower court's removal of intent from those questions to be resolved by the jury. In support, the *Morissette* Court cited *People* v. *Flack*, 125 N.Y. 324, 334, 26 N.E. 267, 270 (N.Y. 1891): "However clear the proof may be, or however incontrovertible may seem to the judge to be the inference of a criminal intention, the question of intent can never be ruled as a question of law, but must always be submitted to the jury."

This Court has continued to reject the presumptive intent argument, acknowledging the need for a jury to determine whether the defendant had the requisite mental state to be punished under the statute. In the antitrust context, the Court in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 435 (1978), concluded that "a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices."

New Jersey, however, seeks to take from the defendant his protection by that jury, and from the jury the

very essence of its function. As the Court said in *Jones*, New Jersey seeks to relegate the jury to a "gatekeeping" role, permitting it to decide some important facts while reserving other equally important facts to be decided by a judge. The role of the jury as the embodiment of community norms is severely compromised when a single judge – rather than a cross-section of the community in which the defendant lives – is permitted to decide whether a defendant committed a "hate crime." The Sixth Amendment's protection of a jury right cannot be so easily overridden, particularly when the statute doubles the sentence and brands a defendant with the stigma of being a bigot in the process.

As one of the leading treatises on jury selection has stated: "[T]he Court has established extraordinarily stringent standards aimed at guaranteeing jury representativeness. This is nowhere clearer than in recent discrimination cases regarding other non-jury areas in which the Court has explicitly excepted jury challenges from its emphasis on discriminatory intent as opposed to impact." National Jury Project, *Jurywork* 5-7 (1990) (Citing *Washington* v. *Davis*, 426 U.S. 229 (1976); *Arlington Heights* v. *Metropolitan Housing Dept. Corp.*, 429 U.S. 252 (1977); *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Duren* v. *Missouri*, 439 U.S. 1357 (1979); and *Batson* v. *Kentucky*, 476 U.S. 79 (1986)).

Richard G. Singer and Mark D. Knoll have observed that, prior to the mid-1980s, federal courts universally held any factor that increased the maximum sentence for a crime constituted an element of the offense that should be resolved by a jury. *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v.

Pennsylvania, 22 Seattle Univ. L. Rev. 1057 (1999). The accepted standard was that any issue of value (as in larceny cases) or quantity (as in Prohibition cases) was a jury question. See, *e.g.*, *Pace* v. *Aderhold*, 2 F. Supp. 261, 263 (N.D. Ga.), aff'd 65 F.2d 790 (5th Cir. 1932); *Olivito* v. *United States*, 67 F.2d 564, 565 (9th Cir. 1933); *United States* v. *Wilson*, 284 F.2d 407, 408 (4th Cir. 1960). In *United States* v. *Kramer*, 289 F.2d 909 (2d Cir. 1961), the Second Circuit thought the label irrelevant. Instead, Judge Henry Friendly eloquently declared that, whatever name is given the factor, when it deeply affects the defendant, it should be resolved by the jury:

> We assume the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than the sentencing judge. There is, of course a certain incongruity in asking a jury to exercise such expertise in the ways of the underworld as to determine the "value" of money orders that can be or have been forged; but the omniscience of the jury extends to harder questions than that.

Id. at 921.

The traditional stance of the federal courts – and of most state courts as well – has been that any factor that increases the maximum sentence must be submitted to the jury. Even in the one major exception to this rule, recidivism, the vast majority of states still requires that the issue be submitted to a jury, as both the majority and dissenting opinions in *Almendarez-Torres* recognized.

Another commentator recently concluded that the standard proffered by this Court in *Jones* – that any factor that increases the maximum sentence (except recidivism)

must be proved to the jury – best comports with prior precedent and with the requirements of the Sixth Amendment. See Benjamin J. Priester, *Further Developments on Previous Symposia: Sentenced for a Crime The Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather than Elements of the Offense*, 61 Law and Contemp. Prob. 249 (1998). Priester concludes:

> The maximum sentences position is a sound constitutional test. . . . This position generally provides great deference to the legislature. . . . The only matter about which the maximum sentences position is not deferential is the definition of the "maximum sentence" for each crime. . . . In addition, the maximum sentences position adopts the distinction between generative statutes and sentencing regulations. The Sentencing Guidelines . . . do not define any new "crimes" . . . the maximum possible sentence is always restricted to that of the underlying statutory offense of conviction.[14]

Id. at 292.

The "increase of maximum sentence" standard establishes a bright line test for determining whether an issue

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[14] A potential increase in the maximum sentence has also shaped other decisions in this Court. Thus, for example, in *Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954), the Court held that where a prior conviction increased the maximum penalty, the Sixth Amendment right to counsel was activated. *Accord Chewning* v. *Cunningham*, 368 U.S. 443 (1962); *Specht* v. *Patterson*, 386 U.S. 605 (1967). While these cases may be distinguished from the case at bar, the underlying premise, that changes in the maximum sentence and stigma require greater protection than that afforded a party in a tort action, has remained unchanged.

goes to the jury. Courts would not have to grapple with whether a factor was "part of the crime" with a more cumbersome "factors" or "totality" approach. Moreover, as Priester notes, factors that increased punishment within the maximum (for example, the Pennsylvania statute at issue in *McMillan, supra*), would be unaffected. In short, this position protects those 25 states (as well as the federal government) that have adopted some form of sentencing guidelines.

B. N.J. Stat. Ann. § 2C:44-3e. Imposes A Significant Societal Stigma That Should Be Imposed Only By A Jury, As A Jury Best Represents The Collective Judgment Of The Community.

The idea that mental state is necessary for criminal conviction "is no provincial or transient notion." *Morisette*, 342 U.S. at 250. "What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition." Henry Hart, The Aims of the Criminal Law, 23 Law and Contemp. Probs. 401, 404 (1958); see also Gardner, *Bailey* v. *Richardson and the Constitution of the United States*, 33 B.U.L. Rev. 176, 193 (1953) ("The essence of punishment for moral delinquency lies in the criminal conviction itself. . . . It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.")

These ideas animated the Court's conclusion in *In re Winship* that the highest standard of proof must be applied in a criminal case "because of the *possibility* that

[the defendant] may lose his liberty upon conviction and because of the *certainty* that he would be stigmatized by the conviction." [emphasis added] 397 U.S. 358, 364 (1970). That statement recognizes the central truth of the criminal law – every criminal conviction, even those which do not, or cannot, result in imprisonment, brands the defendant as an immoral actor. As Justice Brennan concluded: "A society that values the good name . . . of every individual should not condemn a man . . . when there is reasonable doubt about his guilt." *Id.*

That condemnation should come from the jury. As Justice Thomas recently wrote for the majority in *Jones* v. *United States*, 527 U.S. 373, 383 (1999), the jury "express[es] the conscience of the community. . . . " 527 U.S. at 383 (quoting *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988)). The New Jersey statute rejects the history and understanding behind these conclusions and imposes upon the defendant charged with a "racially biased crime" the stigma of bigotry on the slimmest burden of proof, really a mere civil burden of proof, and without permitting the community itself to play a significant role in that determination. Judge Ridgway, moreover, acknowledged the collateral consequences of the stigma bestowed upon the defendant when he stated: " . . . and if there is difficulty . . . with the type of crime and his safety in prison, that's something he'll have to wrestle with." (Pet. App. 161a.)

In contemporary American society, few epithets betray more condemnation than that of "racist". A judgment that a defendant is a racist, particularly when the legislature has decided that such a judgment entails a substantially longer prison sentence, should be rendered

by the broadest cross-section of the community our legal system recognizes – the jury.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the decision of the New Jersey Supreme Court be reversed, the New Jersey hate crime law be declared unconstitutional, Petitioner's twelve-year term of imprisonment on Count 18 be overturned, and this case be remanded to the trial court for a jury trial on the issue of whether there is proof beyond a reasonable doubt that this defendant committed the crime charged "with purpose to intimidate" on account of race.

Respectfully submitted,

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
(856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-6181

Counsel for Petitioner

January 13, 2000

APPENDIX

ENHANCED HATE CRIME STATUTES

Statute	Effect	Standard of Proof
Alabama Code § 13A-5-13	Mandatory minimum.	
Alaska Stat. § 12.55.155(c)(22)	Increase *up to* maximum.	Clear and convincing (subsection (f)).
Arizona Rev. Stat. 13-702(C)(14)	Increase within maximum.	
California Penal Code 422.75	Depending on predicate felony, an increase of between 1-3 and 2-4 years.	No case or statute on point. Generally, however, California requires indictment and BEYOND A REASONABLE DOUBT before any sentencing enhancement is allowed. *People v. Wims*, 895 P. 2d 77(Cal. 1995); *People v. Hernandez*, 757 P. 2d 1013 (Cal. 1988).
Connecticut Penal Code § 53a-40a	Applies only to "persistent offender of crimes involving history or bias"; raised one level.	
District of Columbia Code 22-4003	Increases maximum by 50%.	Requires that defendant be "charged with and found guilty of "a bias-related crime" – BEYOND A REASONABLE DOUBT.
Florida Stat. Ann. § 775.085	Increased by one level.	Must be sent to a jury – BEYOND A REASONABLE DOUBT. *Richards v. State*, 643 So. 2d 89 (Fla. App. 1994); *Woolfork v. State*, 623 So. 2d 823 (Fla. App. 1993); *State v. Hart*, 677 So. 2d 385 (Fla. App. 1996).
Illinois Comp. Stat. Ann. 5-5-3.2	Within maximum.	
Kansas Stat. Ann. § 21-4716	"Departure" within maximum.	Only if there is "substantial compelling" reason.
Maine Rev. Stat. Ann. § 1151 8(B)	Within maximum.	
Mississippi Code Ann. § 99-19-307	Doubles maximum.	Expressly requires proof BEYOND A REASONABLE DOUBT.
Montana Code Ann. 45-5-222	Increase of 2-10 years.	
Nevada Rev. Stat. 193.1675	Increases maximum by 25%.	Explicitly does not create a separate offense, but does not address burden of proof standard.

Statute	Effect	Standard of Proof
New Jersey Stat. Ann. 2C:44-3	Increases maximum sentence, by doubling, or to life imprisonment.	Preponderance of evidence; judge decides at sentencing.
North Carolina Gen. Stat. § 14-3(c)	Raised from a Class 2 or Class 3 misdemeanor to Class 1; raised from Class 1 misdemeanor to Class 1 felony.	
North Carolina Gen. Stat. § 15A-1340-16	Increase within maximum.	Preponderance of evidence; judge decides at sentencing.
Ohio Rev. Code Ann. 2927.12	Raises one level.	
Pennsylvania Cons. Stat. Ann. 18 § 2710	Raises one degree.	See *Com v. Rink*, 574 A. 2d 1678 (Pa. Super. 1990) (Suggests BEYOND A REASONABLE DOUBT.)
Rhode Island 12-19-38	5-year increase.	BEYOND A REASONABLE DOUBT to a jury.

Texas Penal Code § 12.47	Applies only to lesser misdemeanors; increased by one level.	Statute requires "affirmative finding" of racial bias. Evidence must be "relevant and reliable." *Martinez v. State*, 980 S.W. 2d 662 (Tex. App. 1998). In Texas practice, prosecutors give notice in the indictment of information, and juries are instructed at trial. See *Michael McCormick, Thomas Blackwell and Betty Blackwell*, Texas Practice, Vol. 7, § 1.37 and Vol. 8, § 97.12 (10th ed. 1995).
Utah Code 76-3-203.3	Third-degree felony.	
Vermont Stat. Ann. 1455	Increased from 1 year to 2, or from 1-5 to no more than 5. If underlying crime is punished by more than 5 years, the racial bias becomes a sentencing factor within the maximum.	
West Virginia Code 61-6-21(d)	Within maximum.	

Statute	Effect	Standard of Proof
Wisconsin Stat. Ann.	Increased one level, but maximum punishment increase is 5 years.	BEYOND A REASONABLE DOUBT to a jury. See *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

FREE STANDING HATE CRIME STATUTES

Statute	Punishment	Comments
California Penal Code § 422.6	Up to one year and community service.	Specific intent required – see *In re M. S.*, 10 Cal. 4th 698, 896 P. 2d 1365 (1995).
California Penal Code § 594.3	"A felony."	
California Penal Code § 11411	Up to one year.	
Colorado Rev. Stat. Ann. § 18-9-121	Misdemeanor if assault; felony if harm is done.	
Connecticut Penal Code § 53a-181b	Class D felony	
Idaho Code § 18-7902	0-5 years	
Illinois Comp. Stat. Ann. 5/112-7.1	Class 4 felony – first offense.	

Statute	Punishment	Comments
Rhode Island 12-19-38	5-year increase.	BEYOND A REASONABLE DOUBT. See *People v. Davis*, 285 Ill. App. 3d 875, 674, N. E. 2d 895 (1996).
Indiana Stat. Ann. (Burns) § 22-9.5-10-1	Housing discrimination Class A misdemeanor.	
Iowa Code Ann. § 708.2c	Depends upon use of weapon, or whether harm occurred; ranges from "serious misdemeanor" to Class D felony.	
Louisiana Rev. Stat. 107.2	6 months, to run consecutively to underlying offense.	
Ann. Code of Maryland § 470A	10 years	Motive essential element – *Ayers v. State*, 335 Md. 602, 645 A. 2d 22 (1994).
Massachusetts Gen. Laws Ann. § 39	Assault: 0-2½ years Bodily injury battery: 0-5 years	Motive essential element – *Com v. Barnette*, 45 Mass. App. Ct. 486, 699 N.E. 2d 1230 (1998).
Michigan Penal Code § 750.147b	2 years	See *People v. Stevens*, 230 Mich. App. 502, 584 N.W. 2d 369 (1998) – BEYOND A REASONABLE DOUBT.
Minnesota Stat. Ann. § 609.2231(4)	1 year	See *Matter of Welfare of S.M.J.*, 556 N.W. 214 (Minn. App. 1996). Cf. Minn. Stat. Ann. § 611A.29, establishing a civil right of action and explicitly adopting a preponderance standard.
Missouri Stat. Ann. § 557.035	Class D felony	Newly enacted provision, repealing prior offense on "ethnic intimidation." Allows state to charge crime if it "believes" the crime to be racially related.
Montana Code Ann. § 45-5-221	Maximum of 5 years.	
Nevada Rev. Stat. 207.185	Gross misdemeanor.	

Statute	Punishment	Comments
New Jersey Stat. Ann. 2C:12-1e	Fourth-degree crime.	
New Jersey Stat. Ann. 2C:33-4d	Fourth-degree crime.	
New York Penal Law § 240.30	Class A misdemeanor.	BEYOND A REASONABLE DOUBT. See *People v. Pirozzi*, 237 A.D. 2d 628, 656 N.Y.S. 2d 42 (1997).
North Dakota Crim. Code § 12.1-14-04	Class B misdemeanor.	
Oklahoma Stat. Ann. 21 § 850	First offense: misdemeanor Second offense: felony	
Oregon Rev. Stat. 166.155	Class A misdemeanor.	
Oregon Rev. Stat. 166.165	Class C felony.	

South Dakota Code § 22-19B-1	Class of crime depends on amount of harm done.	
Virginia Code § 18.2-57	Depends on harm inflicted.	
Washington Rev. Code 9A.36.080	Class C felony.	
West Virginia Code 61-6-21(b)(c)	Felony – 10 years.	
Wyoming Stat. 6-9-102	Misdemeanor	

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No. 99-478

Supreme Court, U.S.
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In The
Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR RESPONDENT

JOHN J. FARMER, JR.
Attorney General of New Jersey
LISA SARNOFF GOCHMAN
Deputy Attorney General
Counsel of Record
DIVISION OF CRIMINAL JUSTICE
R.J. HUGHES JUSTICE COMPLEX
P.O. Box 086
TRENTON, NEW JERSEY 08625
(609) 292-9086

Counsel for Respondent

BEST AVAILABLE COPY

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QUESTION PRESENTED

Whether the extended term sentencing provision of New Jersey's Hate Crime Statute, N.J.Stat.Ann. § 2C:44-3e (West 1995), which relies on the traditional sentencing factor of motive to increase the statutory maximum period of imprisonment that may be imposed following a conviction of the underlying offense, preserves a criminal defendant's federal constitutional rights to notice by indictment, trial by jury, and due process of law?

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (Pa1-66)[1] is reported at 159 N.J. 7, 731 A.2d 485 (1999). The opinion of the Superior Court of New Jersey, Appellate Division (Pa68-94), is reported at 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997). The opinion of the Superior Court of New Jersey, Law Division, Cumberland County (Pa138-145) is unreported .

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on June 24, 1999. The petition for a writ of certiorari was filed on September 17, 1999, and was granted by this Court on November 29, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury ... nor be deprived of life, liberty, or property, without due process of law....

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to ... trial, by an impartial jury ... and to

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[1] "Pa" refers to the appendix to the petition for a writ of certiorari; "Ja" refers to the parties' joint appendix.

be informed of the nature and cause of the accusation....

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

N.J.Stat.Ann. § 2C:44-3 (West 1995) ("Criteria for sentence of extended term of imprisonment") provides, in pertinent part:

> The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime, other than a violation of N.J.S.2C:12-1a., N.J.S.2C:33-4, or a violation of N.J.S.2C:14-2, or 2C:14-3 if the grounds for the application is purpose to intimidate because of gender, to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e.
>
> * * *
>
> e. The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

STATEMENT OF THE CASE

In the early morning hours of December 22, 1994, petitioner Charles Apprendi, Jr., a white pharmacist, fired several rounds from a loaded rifle into a nearby single-family home, using as targets two black Santa Claus decorations hanging on the front door. The residents, Michael and Mattie Fowlkes and their three children, ages nine, thirteen and sixteen, were the only black family living in petitioner's otherwise all-white neighborhood in Vineland, New Jersey. (Pa2-3; Pa100-02; Pa107-09).

Petitioner was charged by the Cumberland County, New Jersey, Grand Jury in a twenty-three count indictment with four counts of attempted murder in the first degree, four counts of aggravated assault in the second degree, four counts of possession of a firearm for an unlawful purpose in the second degree, four counts of unlawful possession of a loaded rifle in the third degree, unlawful possession of an incendiary device in the third degree, unlawful possession of an anti-personnel bomb in the third degree, four counts of harassment in the fourth degree, and unlawful possession of a firearm silencer in the fourth degree. (Ja2-12).

On July 24, 1995, petitioner entered a guilty plea before the Honorable Rushton H. Ridgway, J.S.C., to counts three and eighteen of the indictment charging second degree possession of a firearm for an unlawful purpose, contrary to N.J.Stat.Ann. § 2C:39-4a (West 1995), and count twenty-two charging third degree unlawful possession of an anti-personnel bomb, contrary to N.J.Stat.Ann. § 2C:39-3a (West 1995). (Ja15-16; Ja24-25; Ja36-41). Petitioner admitted at the plea hearing that his unlawful purpose for shooting at the Fowlkes' home was to frighten or harass the family. (Ja33-41).

Through petitioner's guilty plea, the State satisfied its burden to prove beyond a reasonable doubt the four elements of possession of a weapon for an unlawful purpose under

N.J.Stat.Ann. § 2C:39-4a: one, that petitioner had a firearm; two, that petitioner possessed it; three, that petitioner's purpose or conscious objective was to use it against the person or property of another; and, four, that petitioner intended to use it in a manner that was proscribed by law. *State v. Harmon*, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

The prosecution timely served petitioner with notice that it was seeking an enhanced term of imprisonment on count eighteen pursuant to N.J.Stat.Ann. § 2C:44-3e (West 1995), the extended term provision of New Jersey's "Hate Crime Statute." (Ja21; Ja41; Ja43; Pa166). Under this statute, the same criminal conduct may be more heavily punished if "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Ibid.*[2] Upon application of the prosecuting attorney, an extended term must be imposed if the sentencing court "finds, by a preponderance of the evidence, the grounds in subsection e." *Ibid.* The ordinary sentencing range for a second degree crime is between five and ten years. N.J.Stat.Ann. § 2C:43-6a(2) (West 1995). The extended sentencing range for a second degree crime is between ten and twenty years, N.J.Stat.Ann. § 2C:43-7a(3) (West 1995), which is the ordinary sentencing range for a first degree crime. N.J.Stat.Ann. § 2C:43-6a(1) (West 1995).

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[2] As originally enacted, N.J.Stat.Ann. § 2C:44-3e required that the underlying crime be committed "at least in part with ill will, hatred or bias toward the victim." The 1995 amendment, 1995 N.J. Laws, c.211, § 3, excised this phrase in response to *State v. Mortimer*, 135 N.J. 517, 641 A.2d 257, *cert. denied*, 513 U.S. 970 (1994), which found the same language in N.J.Stat.Ann. § 2C:33-4d (West 1995) (a provision of New Jersey's hate crime law addressing harassment) unconstitutionally vague. (Pa13). The amendment also added "gender" and "handicap" to the protected classes of victims.

At the extended term sentencing hearing held before Judge Ridgway, Michael Fowlkes recalled that on December 22, 1994, he and his wife awoke at 1:55 a.m. to the sounds of gun shots and shattering glass. Eight bullets had been fired at their home, and the front French doors, which were panes of clear glass set in a burgundy frame, were riddled with bullets. (Pa107-09). One of the bullets lodged in the wall of their daughter's bedroom. (Pa109).

Petitioner was arrested shortly thereafter, and he admitted to Detective Dennis D'Augostine that he fired shots into the Fowlkes' home because the residents were black and he was "giving them a message" that they were unwelcome in petitioner's neighborhood. Petitioner knew that a black family lived there because he had seen them outside in the yard, but he did not know the victims personally. (Pa174-78; Pa 299).

Petitioner presented seven character witnesses at the hearing who testified that petitioner did not have a reputation for racial bias against blacks. (Pa182-203).

Petitioner also presented the opinion of Doctor Gerald Cooke, a psychologist who examined petitioner at the Cumberland County Jail on February 15, 1995. (Pa204-07). According to Doctor Cooke, petitioner told him that he had consumed eight alcoholic beverages and some medication on December 22, 1994, and had "feelings that he wanted to destroy something" when the Fowlkes' purple door caught his attention. (Pa210-11). After firing at the Fowlkes' front door, petitioner returned home, hid the gun and went to sleep. (Pa211). The police arrived twenty minutes later and told him that if he cooperated "they would be less stringent." (Pa211-12). Doctor Cooke admitted that he had "no way of knowing" whether petitioner told him the truth during the interview. (Pa228).

Doctor Cooke ruled out the possibility that petitioner suffered from insanity or a diminished capacity. (Pa207-08). The doctor did find, however, a pattern of alcohol abuse and drug dependency. (Pa208-09). He concluded that petitioner had an obsessive-compulsive disorder, mood swings and an impulse disorder of kleptomania. (Pa216-18). The synergistic effect of the drugs and alcohol, combined with petitioner's "anxious and overcontrolled" personality, created "the kind of personality of an individual who would [tell a lie] to get out of this kind of situation." (Pa218-19). Doctor Cooke acknowledged that petitioner had never been treated for any psychiatric disorders or alcohol and drug abuse, and was in fact employed as a pharmacist at the time of the shootings. (Pa223).[3]

Petitioner testified on his own behalf. He claimed that when the police came to his house at 3:00 a.m. of the morning of his arrest he was "extremely exhausted and depressed." Petitioner alleged that he drank three or four vodka drinks several hours before and took medication for his "irritable bowel syndrome," an "opiate" and a "minor tranquilizer." (Pa236-39). Petitioner denied being a racist and claimed that he admitted to a having a racial bias only because Detective

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[3] Petitioner's description of himself at the time he committed the offenses in question as "mentally disabled by an obsessive compulsive disorder and drug and alcohol abuse" (Pet. Brief at 23) distorts the record below. Petitioner's own expert, Doctor Cooke, ruled out the possibility that petitioner suffered from insanity or a diminished capacity. (Pa207-08). Similarly, petitioner's claim that "[i]t is undisputed that [he] was intoxicated when he fired his gun at his neighbors' purple door" (Pet. Brief at 22) is nothing more than a self-serving assessment of his mental condition at the time of the offense. No one other than petitioner himself testified to the amount of alcohol he consumed or drugs he ingested prior to the shooting. All that Doctor Cooke had to rely upon in assessing petitioner's level of intoxication that night was what petitioner told him almost two months later, on February 15, 1995. (Pa 205).

D'Augostine was scaring him with stories of homosexuality and AIDS among the prison population. (Pa242-45).

On cross-examination, petitioner admitted that when the "glass and purple door ... caught [his] eye," he went home, retrieved his rifle and returned to the Fowlkes' residence. (Pa251-52). The rifle was equipped with a "red-dot" scope for accurate aim, as well as a silencer, which he characterized as "toys." (Pa252-53). Petitioner admitted that it would be in his best interest to tell Judge Ridgway that he is not a racist. (Pa255-56).

On rebuttal, Detective D'Augostine testified that petitioner "clearly understood" his *Miranda* rights. (Pa281). In response to the detective's question, petitioner stated that although he had consumed two alcoholic drinks in the late afternoon and two more at 10:30 p.m., he was not under the influence of any alcohol or drugs. (Pa283). Petitioner's breath bore no odor of alcohol, his eyes were not bloodshot, he did not sway and he answered the detective's questions clearly. (Pa284). Petitioner admitted that he fired at the Fowlkes' house on two separate occasions. (Pa288-89). The detective never threatened petitioner, nor did he promise leniency if he cooperated. (Pa286). The interview was immediately terminated when petitioner requested an attorney. (Pa289). Petitioner stipulated that his confession was given in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). (Pa172).

Judge Ridgway found Detective D'Augostine to be credible and "had difficulty believing that [petitioner] was attracted to [the Fowlkes' front] door by the color. And that something went off in his ... intoxicated state of mind that he wanted to destroy the door." (Pa142-43). The judge recalled petitioner's admission under oath at the plea proceeding that his unlawful purpose in shooting at the Fowlkes' house was to scare the occupants. The court was satisfied that petitioner's act was motivated by racial bias and that petitioner was now

denying any such prejudice to avoid the enhanced punishment for a bias crime. (Pa143-44). Judge Ridgway found that the State met its burden of proving by a preponderance of the evidence that petitioner's act was racially motivated and, therefore, petitioner was subject to an extended term of imprisonment. (Pa145). Petitioner was sentenced on count eighteen to an extended custodial term of twelve years with a mandatory period of parole ineligibility of four years. (Pa161).[4]

In a published opinion filed August 19, 1997, the Superior Court of New Jersey, Appellate Division, affirmed petitioner's convictions and sentences and declared N.J.Stat.Ann. § 2C:44-3e constitutional. *State v. Apprendi*, 304 N.J. Super. 147, 698 A.2d 1265 (App. Div. 1997) (Pa81-94). The majority found that the statute did not make racial bias an essential element of the predicate crime. The statute was aimed at deciphering a defendant's motive, a traditional sentencing factor. The imposition of an extended term of imprisonment following a finding of bias by the sentencing court by a preponderance of the evidence standard did not violate the constitutional requirement that the State must prove each element of an offense by the reasonable doubt standard. (Pa86-94).

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[4] The mandatory minimum term was not imposed pursuant to the Hate Crime Statute but was authorized by N.J.Stat.Ann. § 2C:43-6c (West 1995), because petitioner was convicted of possession of a firearm with intent to use it against the person of another. (Pa4).

On count three, petitioner was sentenced to an ordinary term of seven years imprisonment with a mandatory period of parole ineligibility of three years, to be served concurrently to the term imposed on count eighteen. On count twenty-two, petitioner was sentenced to an ordinary term of three years imprisonment, to be served concurrently to the terms imposed on counts three and eighteen. (Pa161).

The concurring member of the panel agreed that N.J.Stat.Ann. § 2C:44-3e was constitutional under the majority's analysis, adding that the sentencing enhancer of the Hate Crime Statute appears in the general sentencing provisions of New Jersey's Code of Criminal Justice and was adopted after the Code's provisions establishing the crimes. The concurring judge compared the Hate Crime Statute to New Jersey's Graves Act which mandates ineligibility terms on sentences where a judge finds by a preponderance of the evidence that a defendant used or possessed a firearm, notwithstanding that the offense for which he or she was convicted did not necessarily involve use or possession of a firearm as an element thereof. (Pa77-80).

The dissenting judge believed that the word "purpose" as used in the Hate Crime Statute was synonymous with "intent" and was thus an element of the predicate offense that had to be proven by the finder of fact beyond a reasonable doubt. (Pa68-76).

Petitioner filed with the Supreme Court of New Jersey an appeal as of right from the dissent in the Appellate Division pursuant to N.J. Court Rule 2:2-1(a)(2). On June 24, 1999, the Supreme Court of New Jersey affirmed the Appellate Division opinion and determined that the Hate Crime Statute did not violate the United States Constitution. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999) (Pa1-28). Analyzing the Hate Crime Statute under relevant United States Supreme Court precedent, the court concluded that petitioner's biased motivation behind the shooting was a sentencing factor to be resolved by the sentencing judge, and not an element of the offense requiring a jury finding beyond a reasonable doubt. (Pa2; Pa22).

Two of the seven members of the court dissented, finding the statute violative of the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment of the United States Constitution. (Pa29-66).

Petitioner filed a petition with this Court for a writ of certiorari on September 20, 1999, which was granted on November 29, 1999. *Apprendi v. New Jersey*, __ U.S. __, 120 S.Ct. 525 (1999).

SUMMARY OF ARGUMENT

N.J.Stat.Ann. § 2C:44-3e (West 1995), the extended term provision of New Jersey's Hate Crime Statute, is a sentencing enhancement provision, not a separate criminal offense. N.J.Stat.Ann. § 2C:44-3e is not invoked until after a criminal defendant has been duly convicted beyond a reasonable doubt of every essential element of a substantive offense defined elsewhere in New Jersey's Code of Criminal Justice. The effect of N.J.Stat.Ann. § 2C:44-3e is to lengthen the maximum term of imprisonment to which the convicted defendant is exposed when the sentencing court is convinced by a preponderance of the evidence that the substantive offense was motivated by racial animus.

The text of N.J.Stat.Ann. § 2C:44-3e supports this conclusion. N.J.Stat.Ann. § 2C:44-3e is not a subsection of any definition of any substantive offense. The statute instead appears in the general sentencing section of the Code and expressly identifies the statutory provision as a sentencing factor. The New Jersey Legislature's intention to make racial bias a sentencing factor applicable to all crimes, rather than an element of enumerated offenses, is clear from the textual analysis of the statute itself.

Applying the constitutional calculus formulated by the Court in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and revisited in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the penalty provision of the Hate Crime Statute does not violate a criminal defendant's right to due process of law under the Fifth and Fourteenth Amendments and right to notice by indictment and trial by jury under the Sixth Amendment. Petitioner would eliminate the *McMillan* test,

substituting in its stead a "bright line" rule that any fact resulting in an increase of the maximum sentence, with the exception of recidivism, must be resolved by a jury. But a "bright line" rule fails to account for the state legislatures' historic role to define elements of an offense and to fix appropriate criminal penalties. A "bright line" rule will also have negative consequences for criminal defendants because it will compel the State to introduce to the jury highly prejudicial evidence of racism in order to meet its burden of proving racial bias beyond a reasonable doubt. The multi-prong *McMillan* test better balances the states' role in the criminal justice system with defendant's federal constitutional rights.

New Jersey's Hate Crime Statute easily meets the *McMillan* test. The challenged statute does not create any impermissible presumptions nor does it relieve the prosecution of its burden of proving guilt. The differential in sentencing is not between a nominal fine and mandatory life sentence but merely increases the ordinary sentencing range for a second degree offense of between five to ten years to an extended range of between ten and twenty years. Petitioner's actual sentence was increased by only two years. The statute does not change the definition of any existing offense or create a separate offense calling for a separate penalty, and there is nothing to imply that the state legislature drafted this statute to avoid the prosecution's reasonable doubt standard. The statute gives "no impression of having been tailored to permit the [racial animosity] finding to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88. The New Jersey Legislature "simply took one factor that has always been considered to bear on punishment ... and dictated the weight to be given that factor...." *Id.* at 89-90.

Although New Jersey's Hate Crime Statute increases the maximum term (rather than imposing a mandatory minimum as was the result of the statute examined in *McMillan)*, the Court has expressly "rejected an absolute rule that an

enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge v. California*, 524 U.S. 721, 729 (1998); *see also Almendarez-Torres*, 523 U.S. at 247. Thus, in *Almendarez-Torres*, the Court upheld a federal statute permitting the increase of the maximum sentence following a judicial finding of recidivism, a traditional sentencing factor.

The Hate Crime Statute targets motive, another traditional sentencing factor. Motive is not the equivalent of intent or *mens rea*. It is admissible at trial by either party, but is not a required element of any offense to be proven by the prosecution unless the legislature makes it so. *See Pointer v. United States*, 151 U.S. 396, 414-15 (1894). The New Jersey Legislature chose to designate motive as an aggravating circumstance at sentencing. That racial animus serves to increase the maximum term of imprisonment a criminal defendant must serve does not transform this traditional sentencing factor into an essential element of an offense.

Motive is highly relevant to the sentencing decision because it reveals the defendant's character at the moment the crime is committed. New Jersey's Hate Crime Statute demands that a criminal defendant's motive be verified during an adversarial hearing before it may be considered by the sentencing judge, further assuring its reliability as a sentencing factor. The statutorily-mandated adversarial proceeding also guarantees that criminal defendants are afforded procedural due process of law prior to the imposition of an extended term of imprisonment pursuant to N.J.Stat.Ann. § 2C:44-3e.

That other jurisdictions have chosen different procedures for punishing hate crimes does not render New Jersey's statute unconstitutional. Federalism demands "[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement." *McMillan*, 477 U.S. at 90. New Jersey has enacted a constitutionally-valid statutory scheme

permitting the sentencing court to impose an extended term of imprisonment once it is satisfied by a preponderance of the evidence that the underlying offense was racially motivated. The Supreme Court of New Jersey correctly concluded that the Hate Crime Statute "falls on the permissible side of the constitutional line," *id.* at 91, and its judgment should be affirmed.

ARGUMENT

THE EXTENDED TERM PROVISION OF NEW JERSEY'S HATE CRIME STATUTE AUTHORIZING AN ENHANCED MAXIMUM TERM OF IMPRISONMENT BASED ON THE TRADITIONAL SENTENCING FACTOR OF MOTIVE PRESERVES A CRIMINAL DEFENDANT'S CONSTITUTIONAL RIGHTS OF NOTICE BY INDICTMENT, TRIAL BY JURY, AND DUE PROCESS OF LAW.

The statutory scheme created by the extended term provision of New Jersey's Hate Crime Statute, N.J.Stat.Ann. § 2C:44-3e (West 1995), punishes a criminal defendant's biased motive in committing the substantive offense. As petitioner concedes (Pet. Brief at 4), New Jersey's ability to enact penalty enhancement statutes in the effort to combat bias-motivated criminal conduct is beyond constitutional challenge. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). He argues, nonetheless, that the method by which New Jersey prosecutes hate crimes is unconstitutional, because N.J.Stat.Ann. § 2C:44-3e dispenses with notice by indictment and trial by jury on the motive finding. His argument fails because the United States Constitution does not require that motive be an essential element of any crime. *See Pointer v. United States*, 151 U.S. 396, 414-15 (1894). The New Jersey Legislature has chosen to designate motive as a sentencing factor, and not an element of possession of a weapon for an unlawful purpose, N.J.Stat.Ann. § 2C:39-4a (West 1995).

See State v. Harmon, 104 N.J. 189, 212, 516 A.2d 1047, 1059 (1986).

By petitioner's own admission at the plea hearing, the criminal intent or *mens rea* element necessary to establish the conviction, that is, his "purpose to use [a firearm] unlawfully against the person or property of another," N.J.Stat.Ann. § 2C:39-4a, was satisfied by his acknowledged purpose to frighten or harass the family asleep inside the Fowlkes' home. (Ja33-41). Petitioner's underlying reason for wanting to frighten or harass the family, that is, his motive, was to send the Fowlkes family "a message" that blacks were unwelcome in petitioner's neighborhood. (Pa174-78; Pa299). While the prosecution bore the burden to prove petitioner's criminal intent (his unlawful purpose) behind the shooting (his conduct), it had no burden under New Jersey law to prove that his conduct was influenced by racial hatred (his motive) in order to obtain a conviction. Motive is relevant to the issue of intent but is not an essential element of possession of a weapon for an unlawful purpose under New Jersey law.

A. Under Basic Principles of Statutory Construction, New Jersey's Hate Crime Statute Does Not Create a New Element of the Substantive Crime.

Before turning to the constitutional question, the State highlights that under the structural approach of *Almendarez-Torres v. United States*, 523 U.S. 224, 229-39 (1998), and *Jones v. United States*, 526 U.S. 227, 232-39 (1999), the extended term provision of New Jersey's Hate Crime Statute is clearly a sentencing factor. The statute appears in a general sentencing provision of New Jersey's Code of Criminal Justice entitled "Authority of Court in Sentencing," and was adopted long after the Code's provisions establishing the underlying crimes. *State v. Apprendi*, 304 N.J. Super. 147, 160, 698 A.2d 1265, 1272 (App. Div. 1997) (Stern, J., concurring) (Pa79). The statute is expressly designated "Criteria for sentence of extended term of imprisonment." Unlike the

federal carjacking statute at issue in *Jones* which blended sentencing upgrade provisions within the text defining the crime itself, the plain language and structure of the Hate Crime Statute unquestionably establishes that the statute does not add any new elements to any crime as defined in the Code, but was intended only as a sentencing enhancer. *See Jones*, 526 U.S. at 232 ("some statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sentencing factors"), and *McMillan v. Pennsylvania*, 477 U.S. 79, 85-86 (1986) (express identification of statutory provision as sentencing factor). While the actor's biased motive might well have been included as an element of certain substantive offenses, the New Jersey Legislature chose not to redefine any offense in order to so include it, and this Court should "hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties." *McMillan*, 477 U.S. at 86. The placement of this statute within New Jersey's Code of Criminal Justice, as well as the plain language of the statute itself, manifests the obvious legislative intent.

The Supreme Court of New Jersey in *Apprendi*, it must be noted, chose not to rely upon this structural approach: "Merely because the Legislature has placed the hate-crimes enhancer within the sentencing provisions of the Code of Criminal Justice does not mean that the finding of a biased purpose to intimidate is not an essential element of the offense." (Pa16). But the fact that N.J.Stat.Ann.§ 2C:44-3e is so readily identifiable as a separate sentencing factor under basic principles of statutory construction is a solid stepping-stone on the path leading to the ultimate determination that the extended term provision of New Jersey's Hate Crime Statute is constitutional.

B. Applying the Constitutional Calculus Formulated By This Court in a Line of Authorities Addressing the "Sentencing Factor Versus Element" Debate, New Jersey's Hate Crime Statute Guarantees Petitioner's Fifth and Sixth Amendments Rights.

An indictment must set forth each element of the crime that it charges. *Hamling v. United States*, 418 U.S. 87, 117 (1974). Concomitantly, the Constitution prohibits criminal convictions "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged." *In re Winship,* 397 U.S. 358, 364 (1970). But an indictment "need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime," *Almendarez-Torres*, 523 U.S. at 228, and the State need not prove beyond a reasonable doubt factors relevant to sentencing. *McMillan*, 477 U.S. at 92; *Patterson v. New York*, 432 U.S. 197, 207 (1977). Within limits, the question whether a factor is an element of the offense or a sentencing factor is generally left to the legislature. *Almendarez-Torres*, 523 U.S. at 228.

Applying the *Winship* principle that every element must be proven beyond a reasonable doubt, the Court held in *Mullaney v. Wilbur,* 421 U.S. 684, 699 (1975), that under a Maine statute that defined the offense of first degree murder in terms of the absence of heat of passion, due process required the State to bear the burden on that fact. "Read literally, this language ... suggests that [the legislature] cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt." *Almendarez-Torres*, 523 U.S. at 240. Two years after the *Mullaney* decision, however, the Court in *Patterson v. New York*, 432 U.S. at 207, made "absolutely clear that such a reading of Mullaney is wrong." *Almendarez-Torres*, 523 U.S. at 240.

The *Patterson* Court upheld New York's murder statute which reduced murder to manslaughter if the defendant proved by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional disturbance. Thus, in *Patterson*, the Court "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *McMillan*, 477 U.S. at 84 (quoting *Patterson v. New York*, 432 U.S. at 214).

In *McMillan,* the Court examined the constitutionality of a provision of Pennsylvania's Mandatory Minimum Sentencing Act, authorizing judges to sentence anyone convicted of certain enumerated felonies to no less than five years imprisonment if the judge found, by a preponderance of the evidence, that the person "visibly possessed a firearm" during the commission of the offense. *Id.* at 80-82. Rebuffing the petitioners' contention that visible possession of a firearm was an element of the offense that had to be proven beyond a reasonable doubt, the Court noted that the legislature's definition of the elements of the offense is usually dispositive in distinguishing between essential elements of an offense and mere sentencing factors. *Id.* at 85.

The *McMillan* Court scrutinized the Pennsylvania statute using multiple criteria to determine the constitutionality of imposing a mandatory minimum sentence based on a finding of a fact not proven beyond a reasonable doubt. *Id.* at 87-88. The Court found that the Act created no presumptions of guilt, nor did it relieve the prosecution of its burden of proving guilt and only became applicable after a defendant was duly convicted of the crime for which he is to be punished. *Id.* at 87. A defendant sentenced pursuant to the Act did not face, as did the defendant in *Mullaney*, "'a differential in sentencing ranging from a nominal fine to a mandatory life sentence.'" *Ibid.* (quoting *Mullaney v. Wilbur*, 421 U.S. at 700). The statute did not alter the maximum penalty for the crime committed but operated solely to limit the sentencing court's

discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm. *McMillan*, 477 U.S. at 87-88. Nor was a separate offense calling for a separate penalty created. *Id.* at 88. Finally, the statute gave "no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Ibid.*; *see also Almendarez-Torres*, 523 U.S. at 242-43. The Pennsylvania Legislature "did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -- the instrumentality used in committing a violent felony -- and dictated the precise weight to be given that factor if the instrumentality is a firearm." *McMillan*, 477 U.S. at 89-90.

The *McMillan* Court speculated in *dicta* that the claim that a sentencing factor was really an element of the offense "would have at least more superficial appeal" if a finding of such fact exposed the defendant to greater or additional punishment. *Id.* at 88. That consideration was subsequently tempered in *Almendarez-Torres* in which the Court rejected the argument that any factor triggering an increase in the maximum permissive sentence is an element of the offense which must be proven beyond a reasonable doubt.

In *Almendarez-Torres*, the Court considered whether subsection (b) of 8 U.S.C. § 1326 (Supp. II 1996) described an element of an offense or was simply a sentence enhancer. Subsection (a) of this statute defines a crime by forbidding an alien who once was deported to return to the United States without special permission, and it authorizes the imposition of a prison term of up to, but no more than, two years. 8 U.S.C. § 1326 (a). Subsection (b)(2) of the same statute authorizes the imposition of a prison term of up to, but no more than, twenty years for "any alien described" in subsection (a), if the initial "deportation was subsequent to a conviction for commission of an aggravated felony." 8 U.S.C. § 1326(b)(2). Employing the constitutional analysis

formulated in *McMillan*, the Court held that subsection (b)(2) of 8 U.S.C. § 1326 did not describe an element of an offense but simply was a sentence enhancer. *Almendarez-Torres,* 523 U.S. at 242-43.

The Court rejected the argument that because the recidivist statute before it altered the maximum sentence and created a wider range of appropriate punishment than did the statute in *McMillan* it necessarily failed to meet the *McMillan* test. *Almendarez-Torres*, 523 U.S. at 243. "These differences do not change the constitutional outcome for several basic reasons." *Ibid.* First, recidivism, the sentencing factor at issue in the alien deportation statute, "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Ibid.* Second, the difference between a permissive maximum and a mandatory minimum "does not systematically, or normally, work to the disadvantage of a criminal defendant. To the contrary, a statutory minimum binds a sentencing judge; a statutory maximum does not." *Id.* at 244. Third, judges have "typically exercised their discretion within broad sentencing ranges" such as that authorized by 8 U.S.C. § 1326. *Ibid.* Finally, the statute at issue did "not change a pre-existing definition of a well-established crime, nor is there any more reason here, than in McMillan, to think Congress intended to 'evade' the Constitution, either by 'presuming' guilt or 'restructuring' the elements of an offense." *Id.* at 246.

One year later, the Court revisited the "element versus sentencing factor" debate in *Jones*, *supra*, in which it was determined that a penalty provision based on a finding of serious bodily injury or death intertwined within the definition of the substantive crime of carjacking under the federal carjacking statute, 18 U.S.C. § 2119 (Supp. IV 1992), was not a sentence enhancer that could be found by the sentencing court by a preponderance of the evidence, but historically was an element of the offense that had to be proven to the trier of fact beyond a reasonable doubt.

At issue in *Jones* were the enhanced penalties available under the grading sections of the federal carjacking statute if the offense resulted in serious bodily injury (requiring an increase in imprisonment from fifteen years up to twenty-five years) or death (requiring an increase in imprisonment from fifteen years up to a life term). The indictment in *Jones* made no reference to serious bodily injury, and the jury was not instructed to find this fact beyond a reasonable doubt. *Jones*, 526 U.S. at 230. Jones was found guilty of carjacking, ordinarily punishable by a term of imprisonment not to exceed fifteen years. 18 U.S.C. § 2119(1). The presentence report, however, indicated that one of the victims had suffered serious bodily injury during the carjacking and the district court thus imposed a twenty-five-year sentence in accord with 18 U.S.C. § 2119(2). The United States Court of Appeals for the Ninth Circuit did not read § 2119(2) as setting out an element of an independent offense and upheld the conviction and sentence. *Jones*, 526 U.S. at 231. The Court reversed.

The federal carjacking statute was structurally muddled in its treatment of injury as an element or penalty factor, thus prompting the *Jones* Court, out of respect to Congress, to invoke the doctrine of constitutional doubt: "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones*, 526 U.S. at 239 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). Applying this doctrine, the Court concluded that the enhanced penalty provision of the federal carjacking statute should not be viewed as a mere sentencing factor, in part, because the degree of injury to a victim has traditionally been treated, both by Congress and by state legislatures (including New Jersey, *see State v. Federico*, 103 N.J. 169, 510 A.2d 1147 (1986)), as an element of the predicate offense, such as aggravated robbery. *Jones*, 526 U.S. at 234-35. The Court thus construed § 2119 as establishing three

separate offenses by the specification of distinct elements. *Id.* at 262.

In reaching this result, the Court was careful not to overrule its prior decision in *Almendarez-Torres* that "not every fact expanding a penalty range must be stated in a felony indictment." *Id.* at 248. Instead, the *Jones* Court acknowledged that recidivism, the factor in issue in *Almendarez-Torres*, historically is treated as a sentencing enhancer and is "potentially distinguishable for constitutional purposes from other facts that might extend the range of possible sentencing." *Id.* at 249. Similarly, the instrumentality used in committing a violent felony "has always been considered by sentencing courts to bear on punishment." *McMillan*, 477 U.S. at 90. Indeed, the *Jones* Court did "not announce a new principle of constitutional law, but merely interpret[ed] a particular federal statute in light of a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century." *Jones*, 526 U.S. at 251 n.11.

In discussing the rule of "constitutional doubt" the *Jones* Court explained that the Court's precedents "suggested," but did not establish, a constitutional principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury and proven beyond a reasonable doubt." *Id.* at 243 n.6. It is of utmost significance, however, that in neither *Almendarz-Torres* nor *Jones* was the question of motive as a sentencing factor presented. The Court has "rigidly adhered" to the command that it is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885); *see also Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-02 (1985). Nothing in *Jones* requires this Court to find

unconstitutional the extended term provision of New Jersey's Hate Crime Statute. To the contrary, the penalty enhancer embodied in N.J.Stat.Ann. § 2C:44-3e is based upon motive, a traditional sentencing factor that need not be charged in the indictment or submitted to the jury.[5]

i. The *McMillan* Multi-Faceted Constitutional Test Protects a Criminal Defendant's Rights and Preserves a State Legislature's Historic Role in Defining Elements of Crimes.

This Court should resist the temptation to erect a quick and pat "bright line" rule that dispenses with an individualized constitutional analysis of a statutory sentencing enhancer. The lure of a "bright line" rule is, of course, that it can be applied blindly by state courts without further guidance. But a blanket rule will severely weaken both the state legislatures' historic function within the criminal justice system to define the elements required for a substantive offense of which the defendant is charged, *McMillan*, 477 U.S. at 85; *Patterson v. New York*, 432 U.S. at 210, and their primary responsibility to fix appropriate criminal penalties. *Mitchell*, 508 U.S. at 486; *Payne v. Tennessee*, 501 U.S. 808, 824 (1991).

For an equally important reason, the Court has thus far rejected on two occasions the type of absolute rule advocated by petitioner that any fact, other than a prior conviction, constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed. *Monge*, 524 U.S. at 729; *Almendarez-Torres*, 523 U.S. at

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[5] Contrary to petitioner's reading of the case, *United States v. Gaudin*, 515 U.S. 506 (1995), is not "intriguingly on point." (Pet. Brief at 32). In *Gaudin*, the government conceded that materiality was an essential element of the crime of perjury. The question, then, was whether the element of materiality could be found by the judge, and not the jury. *Id*. Here, there is no concession by the State that motive is an essential element of any offense.

234-35. Labeling a sentencing factor an element of an offense exposes the jury to prejudicial information, against a defendant's best interests, that may unduly influence the verdict:

> One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense, but there are also cases in which fairness calls for defining a fact as a sentencing factor. A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute that amount of drugs allegedly involved.

Monge, 524 U.S. at 729. Similarly, in *Almendarez-Torres*, 523 U.S. at 235, the Court recognized the "significant prejudice" to a defendant if the Government were required to prove to the jury that the defendant was previously deported subsequent to a conviction for commission of an aggravated felony.

The Supreme Court of New Jersey, in *Apprendi*, has identified similar prejudice to a defendant if racial bias were made an element of the predicate offense subject to a jury finding beyond a reasonable doubt:

> To allow generally in criminal trials proof of the biases of the accused creates an added risk of prejudice for defendants. It would open trials to evidence of former acts of bias on the part of the actor. It would inject into the trial of cases issues of racial or ethnic bias that have a potential to inflame a jury.

(Pa24) (internal citations omitted). Petitioner himself insists that "few epithets betray more condemnation than that of 'racist.'" (Pet. Brief at 38). If, as petitioner contends, racial bias were an element of the offense, the prosecution would have no choice but to prove that element beyond a reasonable doubt, necessitating the introduction of far greater inflammatory evidence of racism. *Cf. Monge, supra; Almendarez-Torres, supra; see also State v. Mortimer*, 135 N.J. 517, 538, 641 A.2d 257, 267, *cert. denied*, 513 U.S. 970 (1994) (noting the "danger of undue prejudice" attendant to the introduction at trial of evidence of a "defendant's bigoted thoughts, expressions, and associations"); *State v. Crumb*, 277 N.J. Super. 311, 649 A.2d 879 (App. Div. 1994) (same). On the other hand, treating racial bias as a sentencing factor to which only the court and not the jury is privy minimizes the quantity of prejudicial evidence submitted at trial, thus reducing the risk of antagonizing the jury and increasing the possibility of a complete acquittal or of a conviction of a less serious offense.

Severance of counts of the indictment is an option to a criminal defendant only when the count alleging racial bias can be isolated from the remaining counts. *See State v. Crumb*, 277 N.J. Super. at 321, 649 A.2d at 884. It is not an option, however, where, as in petitioner's case, the substantive offenses listed in the indictment charging attempted murder, aggravated assault, and possession of a weapon for an unlawful purpose are all alleged to be racially motivated. If racial bias is deemed an essential element of the substantive offenses charged, bifurcation is impossible. Only counts of the indictment, not elements contained within each count, can be severed and tried separately. As a practical matter, then, criminal defendants reap a tangible benefit from the legislature's decision to make bias motive an aggravating factor to be considered at a separate sentencing proceeding,

rather than an element of the substantive offense to be proven to the jury beyond a reasonable doubt.[6]

A "bright line" rule also conflicts with well-established death penalty jurisprudence. There is no Sixth Amendment mandate that aggravating factors submitted by the prosecution in the penalty phase of a capital trial be determined by a jury, *Walton v. Arizona*, 497 U.S. 639 (1990); *Clemons v. Mississippi*, 494 U.S. 738 (1990); *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam); *Spaziano v. Florida*, 468 U.S. 447 (1984); or proven beyond a reasonable doubt. *See State v. Ramseur*, 106 N.J. 123, 186, 524 A.2d 188, 219 (1987). This is because an aggravating factor submitted at the penalty phase "is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" *Hildwin v. Florida*, 490 U.S. at 640 (quoting *McMillan*, 477 U.S. at 86); *accord Walton v. Arizona*, 497 U.S. at 649 (aggravating circumstances are standards to be used during the sentencing phase of the capital murder case to assist in the choice of sentencing a defendant to death or to life imprisonment and as such are not separate elements of the crime). Thus, "adopt[ing] a rule that any significant increase in a statutory maximum sentence would trigger a Constitutional 'elements' requirement ... would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here." *Almendarez-Torres,* 523 U.S. at 247.

The *Jones* Court attempted to reconcile this anomaly by "characteriz[ing] the finding of aggravating facts falling within

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[6] The court in *Crumb* perceived "little cost to judicial efficiency resulting from severance" of the bias count, a fourth degree offense, from the murder count, because if the jury convicted defendant of the homicide offense, it was unlikely that the State would proceed on the bias offense. *State v. Crumb*, 277 N.J. Super. at 321, 649 A.2d at 884.

the traditional scope of capital sentencing as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *Jones*, 526 U.S. at 251. But this distinction elevates form over substance to an unforgiving degree. If the demarcation between judge and jury depends solely on how a court chooses to "characterize" a particular statute, without regard to what the legislature plainly intended to accomplish, then a defendant such as petitioner whose maximum term was increased by a mere two years may have a constitutional right to a jury finding of the sentencing factor of motive under the "reasonable doubt" standard, while a capital defendant facing death will not. *See id.* at 272 (Kennedy, J., dissenting).[7]

Further, "'the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged.'" *McMillan*, 477 U.S. at 85 (emphasis in original) (quoting *Patterson v. New York*, 432 U.S. at 210). When it is clear that the state legislature intended to treat an aggravating circumstance as a sentencing factor, and not as an element of the substantive offense, it should make no constitutional difference how the legislature classified the sentencing provision. Here, the New Jersey Legislature opted to add an extended term of imprisonment on top of the statutory maximum available for the substantive offense when the aggravating factor of racial bias is found by the judge. It could have reached the same result by increasing the statutory range for the substantive offense and reserving the maximum sentence authorized when the racial bias factor is found by the

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[7] Without denigrating the "significance of the jury's role as a link between the community and the penal system," the State notes that state legislation, too, conveys the "community's voice." *Spaziano v. Florida*, 468 U.S. at 462. Through the New Jersey Legislature, its constituents have indicated their approval of hate crime legislation that increases a criminal defendant's punishment based on a judge's finding, at sentencing, that the underlying offense was racially motivated. *See id.*

judge. *Cf. Almendarez-Torres*, 523 U.S. at 245 (finding by judge of recidivism increases the sentence within "the statute's broad permissive sentencing range" from two to twenty years). Petitioner would face the same term of incarceration under either statutory scheme.

Finally, that a "bright line" rule is to be avoided is apparent from the result in *Almendarez-Torres* in which the Court found that an increase in sentence beyond the statutorily-authorized range for the predicate offense based on recidivism does not violate the right to notice by indictment. The rule proffered by petitioner simply incorporates an exception designed to preserve the holding in *Almendarez-Torres*. But there are other appropriate sentencing factors, including racial bias, not yet considered by this Court that mechanically, and unfairly, would be deemed unconstitutional under a "bright line" rule.

This Court should adhere instead to the multi-faceted test formulated in *McMillan* and adopted in *Almendarez-Torres*. In *McMillan*, the Court noted, "[o]ur inability to lay down any 'bright line' test may leave the constitutionality of statutes more like those in *Mullaney* and *Specht* [*v. Patterson*, 386 U.S. 605 (1967)] than is the Pennsylvania statute to depend on differences of degree, but the law is full of situations in which differences of degree produce different results." *McMillan*, 477 U.S. at 91. The *McMillan/Almendarez-Torres* test is entirely workable, as evidenced by the ease with which the Supreme Court of New Jersey was able to apply it to the Hate Crime Statute.

Under the *McMillan* test, New Jersey's Hate Crime Statute withstands constitutional scrutiny. N.J.Stat.Ann. § 2C:44-3e does not create any impermissible presumptions, nor does it relieve the prosecution of its burden of proving guilt; indeed, it is entirely inapplicable unless the prosecution first proves a defendant's guilt of the underlying offense beyond a reasonable doubt. *See McMillan*, 477 U.S. at 87. The

differential in sentencing is not between a nominal fine and mandatory life sentence, *see Mullaney v. Wilbur*, 421 U.S. at 700, but merely increases the ordinary sentencing range for a second degree offense of between five to ten years, N.J.Stat.Ann. § 2C:43-6a(2) (West 1995), to an extended range of between ten and twenty years, N.J.Stat.Ann. § 2C:43-7a(3) (West 1995). The statute does not change the definition of any existing offense or create a separate offense calling for a separate penalty, and there is nothing to imply that the state legislature drafted this statute to avoid the prosecution's reasonable doubt standard. *See McMillan*, 477 U.S. at 89-90; *see also* Pa20-22. New Jersey's Hate Crime Statute gives "no impression of having been tailored to permit the [racial animosity] finding to be a tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88. The New Jersey Legislature "simply took one factor that has always been considered by sentencing courts to bear on punishment ... and dictated the weight to be given that factor...." *Id.* at 89-90.

The sole *McMillan* factor with which the Hate Crime Statute is at odds is that the statute exposes petitioner to additional punishment. *See id.* at 88. As *Almendarez-Torres*, 523 U.S. at 243-46, and *Monge*, 524 U.S. at 729, make plain, however, this difference is not by itself fatal to the statute, so long as the penalty provision does not define a separate crime. N.J.Stat.Ann. § 2C:44-3e does not violate this principle.

To sustain petitioner's conviction for possession of a weapon for an unlawful purpose under N.J.Stat.Ann. § 2C:39-4a, the State had to prove four elements beyond a reasonable doubt: one, that petitioner had a firearm; two, that petitioner possessed it; three, that petitioner's purpose or conscious objective was to use it against a person or property of another; and, four, that petitioner intended to use it in a manner that was proscribed by law. *State v. Harmon*, 104 N.J. at 212, 516 A.2d at 1059. The State was not, however, required to prove that petitioner's conduct was motivated by a

discriminatory point of view to satisfy the elements of possession of a weapon for an unlawful purpose. The sentencing court's subsequent finding of motive pursuant to N.J.Stat.Ann. § 2C:44-3e was in addition to, not in lieu of, a finding of *mens rea* supported by petitioner's guilty plea under the reasonable doubt standard. N.J.Stat.Ann. § 2C:44-3e does not define a separate offense.

ii. Motive is a Traditional Sentencing Factor, Not an Essential Element of the Underlying Offense, that is Relevant to the Sentencing Phase and Verifiable at an Adversarial Hearing.

Penalty enhancement statutes single out "bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm." *Mitchell*, 508 U.S. at 487-88. In enacting N.J.Stat.Ann. § 2C:44-3e, the New Jersey Legislature has determined that

> the same criminal conduct may be more heavily punished if the victim is selected because of his race or other protected status than if no such motive obtained. Thus, although the [Hate Crime] statute punishes criminal conduct, it enhances the maximum penalty for conduct motivated by a discriminatory point of view more severely than the same conduct engaged in for some other reason or no reason at all.

Id. at 484-85. Petitioner confuses motive (the *sine qua non* of New Jersey's Hate Crime Statute) with criminal intent (the *sine qua non* of New Jersey's unlawful possession of a weapon statute) to claim that the Hate Crime Statute unconstitutionally allows the sentencing court to decide, by a preponderance of the evidence, a defendant's mental state

under a statute which can increase the maximum sentence. His argument that N.J.Stat.Ann.§ 2C:44-3e punishes criminal intent stems from the statute's reference to the accused's "purpose to intimidate." The *Apprendi* court, however, equated "purpose to intimidate" with "motive," (Pa22), and this Court is "bound by a state court's construction of a state statute." *Mitchell*, 508 U.S. at 483; *see also Mullaney v. Wilbur*, 421 U.S. at 691 ("state courts are the ultimate expositors of state law").

This Court has long recognized that motive need not be an essential element of the substantive offense itself. *Pointer v. United States*, 151 U.S. at 415; *see also McDowell v. United States*, 274 F.Supp. 426, 431 (E.D. Tenn. 1967) ("[T]here is no requirement, constitutional or otherwise, that motive be made an essential element of any crime.").[8] Approving an instruction that told the jury that to find the defendant guilty of murder the prosecution need not prove "that a motive for the act done existed," the *Pointer* Court

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[8] *Accord United States v. Hirschberg*, 988 F.2d 1509, 1515 (7th Cir.), *cert. denied sub. nom. Lowrance v. United States*, 510 U.S. 918 (1993); *United States v. Bagaric*, 706 F.2d 42, 53 (2d Cir.), *cert. denied sub nom. Logarusic v. United States*, 464 U.S. 840 (1983); *United States v. Brown*, 518 F.2d 821, 828 (7th Cir.), *cert. denied*, 423 U.S. 917 (1975); *Reed v. United States*, 377 F.2d 891, 893 (10th Cir. 1967); *O'Leary v. United States*, 160 F.2d 333, 335 (9th Cir. 1947); *Clifton v. State*, 73 Ala. 473, _ (1883); *State v. Hunter*, 136 Ariz. 45, 50, 664 P.2d 195, 200 (1983); *State v. Gray*, 221 Conn. 713, 722, 607 A.2d 391, 396 (1992); *State v. Andrews*, 505 N.E.2d 815, 824 (Ind. App. 1987); *Marcum v. Commonwealth*, 8 K.L.Rptr. 418, _, 1 S.W. 727,728 (1886); *State v. Bahre*, 456 A.2d 860, 868 (Me. 1983); State *v. Selman*, 433 S.W.2d 572, 575 (Mo. 1968); *State v. Lucey*, 24 Mont. 295, _, 61 P. 994, 996 (1890); *Sharp v. State*, 117 Neb. 304, _, 220 N.W.2d 292, 294-95 (1928); *State v. Hampton*, 317 Or. 251, 257 n.12, 855 P.2d 621, 624 n.12 (1993); *State v. Mendoza*, 709 A.2d 1030, 1037 (R.I. 1998); *Whitaker v. State*, 160 Tex.Crim. 271, 280, 268 S.W.2d 171, 177 (1954); *State v. Powell*, 126 Wash.2d 244, 261, 893 P.2d 615, 625 (1995).

explained that motive is not indispensable to the conviction. *Pointer v. United States*, 151 U.S. at 414. "[I]f the facts constituting [murder] were established beyond a reasonable doubt, it was the duty of the jury to have found the defendant guilty as charged, although it may have been impossible to discover any adequate motive for the killing." *Ibid.*

Motive and intent are not interchangeable concepts. 21 Am. Jur. 2d. *Criminal Law* § 140 (1998); *see also Allen v. City of Los Angeles*, 92 F.3d 842, 850 (9th Cir. 1996) (under California law, motive and intent are "not synonymous"); Black's Law Dictionary 1014 (6th rev. ed. 1990) ("In law there is a distinction between" motive and intent). "Motive is the moving course, the impulse, the desire that induces the defendant to criminal action. It is distinguished from intent, which is the purpose to use a particular means to effect a certain result." *Allen v. City of Los Angeles*, 92 F.3d at 850.

> An accused can steal to prevent his family from starving or kill to rid the community of a menace, but the laudatory qualities of the design do not absolve him from the application of criminal sanctions. If it were otherwise, the administration of criminal law would become chaotic, since the prosecution would be compelled to analyze the psyche of each defendant and to prove that, in fact, it was malignant.

Morss v. Forbes, 24 N.J. 341, 359, 132 A.2d 1, 11 (1957).

When proof of motive is relevant to the case it may be offered by the prosecution to show guilt, or by the accused to show innocence. *See State v. White,* 457 S.E.2d 841, 857, 340 N.C. 264, *cert. denied*, 561 U.S. 994 (1995); *Emory v. State,* 101 Md. App. 585, 605-06, 647 A.2d 1243, 1254

(1994), *cert. denied*, 337 Md. 90, 651 *A*.2d 855 (1995); Wharton's Criminal Law *Motive* § 89 (1993). Evidence of motive helps to explain an otherwise inexplicable act of random violence. *State v. Crumb*, 277 N.J. Super. at 317, 649 A.2d at 872; *accord People v. Hoffman*, 225 Mich.App. 103, 109-10, 570 N.W.2d 146, 149 (1997). But, when proof of motive is not required for the conviction of a crime, the absence of motive, by itself, does not raise a reasonable doubt of guilt. *State v. Caruolo*, 524 A.2d 575, 584 (R.I. 1987); *State v. Bahre*, 456 A.2d 860, 868 (Me. 1983). The accused is not entitled to an acquittal of a crime "simply because his motive for perpetrating it cannot be discovered." *State v. Bahre*, 456 A.2d at 868.

The true worth of motive in a criminal prosecution is apparent at sentencing. New Jersey's sentencing statutes "emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime." *Williams v. New York*, 337 U.S. 241, 247 (1949). Although the severity of the crime is the single most important factor in New Jersey's sentencing process, *State v. Hodge*, 95 N.J. 369, 378, 471 A.2d 389, 394 (1984), a defendant also is to be considered as a "whole" person. *State v. Towey*, 244 N.J. Super. 582, 593-94, 583 A.2d 352, 357 (App. Div. 1990), *certif. denied*, 122 N.J. 159 (1990); *see also State v. Humphreys*, 89 N.J. 4, 13, 444 A.2d 569, 574 (1982). "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. at 247.

The fundamental issue involved at all sentencing proceedings is "a determination of the appropriate punishment to be imposed on an individual. The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Spaziano v. Florida*, 468 U.S. at 459 (internal citations omitted). "A sentencing judge ... is not confined to the narrow issue of guilt. His task within fixed statutory or

constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined." *Williams v. New York*, 337 U.S. at 247. A sentencing court may take into account material facts concerning a defendant's background which though relevant to the question of punishment could not properly have been brought to the attention of the jury in its consideration of the question of guilt. Thus, a sentencing judge properly may consider the offender's history of prior antisocial behavior, including uncharged crimes for which he had not been duly convicted. *Ibid*.

For example, in *United States v. Dunnigan*, 507 U.S. 87, 94 (1993), the Court held that a defendant's commission of perjury at her trial for conspiracy to distribute cocaine is "of obvious relevance" to the determination of the extent of punishment following her conviction for conspiracy "because it reflects on a defendant's criminal history, on her willingness to accept the commands of the law and the authority of the court, and on her character in general."

Similarly, in *United States v. Grayson*, 438 U.S. 41 (1978), defendant was confined in a federal prison camp following a conviction for distributing a controlled dangerous substance. Defendant escaped from prison but was soon after captured. At defendant's trial for prison escape the judge found that defendant lied under oath about the circumstances of his escape and considered that factor in sentencing defendant to a term of two years imprisonment, consecutive to his unexpired term. *Id*. at 44. The Court rejected defendant's constitutional argument that he was punished for the crime of perjury for which he had not been indicted, tried or convicted by due process. "[T]he evolutionary history of sentencing ... demonstrates that it is proper -- indeed, even necessary for the rational exercise of discretion -- to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light that may shed on the sentencing decision." *Id*.

at 53. Sentencing enhancements increase a defendant's sentence because of the manner in which he committed the crime of conviction; they do not punish a defendant for crimes of which he was not convicted. *United States v. Watts*, 519 U.S. 148, 154 (1997) (citing *Witte v. United States*, 515 U.S. 389, 402-03 (1995) (per curiam)). Although neither sentence imposed in *Grayson* or *Dunnigan* was in excess of the statutory limit, the Court's endorsement of uncharged conduct as a relevant and material sentencing factor is instructive here.[9]

Motive is another important sentencing factor identified by the Court. *Mitchell*, 508 U.S. at 485. Whether the actor acts out of racial animosity, pecuniary gain, jealousy or revenge, his motive reveals his individual character at the time the underlying offense is committed. Such information is "[h]ighly relevant -- if not essential" to the selection of an

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[9] Uncharged conduct may be considered at sentencing without violating the Double Jeopardy Clause of the Fifth Amendment. Thus, a criminal defendant may be convicted and sentenced for a crime when the conduct underlying that offense has been considered in determining the defendant's sentence for a previous conviction. *Witte v. United States*, *supra*; *cf. Edwards v. United States*, 523 U.S. 511 (1998) (under federal sentencing guidelines, sentencing judge can consider whether the drug conspiracy of which the defendant was convicted involved both cocaine and crack, even though the jury's general verdict did not distinguish between the two factual predicates supporting the conspiracy charge); *Monge*, *supra* (sentencing court determined that the State produced insufficient evidence of qualifying prior conviction to trigger sentence enhancement under California's "three-strikes" law; double jeopardy did not prohibit a remand to the trial court to give the State a second opportunity to prove the allegation of the prior conviction); *United States v. Watts*, *supra* (under the federal sentencing guidelines, a jury's verdict of acquittal on one count does not preclude the sentencing court from considering the conduct underlying the acquitted charge in setting an appropriate sentence for the counts of which the defendant was convicted, so long as the conduct underlying the acquitted charge was proven by the Government by a preponderance of the evidence).

appropriate sentence. *Williams v. New York*, 337 U.S. at 247. Thus, in *Barclay v. Florida*, 463 U.S. 939, 949 (1983) (plurality opinion), the Court determined that the Eighth and Fourteenth Amendments to the United States Constitution do not prohibit a judge from taking into account the racial hatred fueling the murder for which the defendant was convicted in determining whether he should be sentenced to die. In *Dawson v. Delaware*, 503 U.S. 159, 165 (1992), a later death penalty case, the Court added "that the Constitution does not erect a per se barrier to the admission of evidence concerning one's belief and associations at sentencing simply because those beliefs and associations are protected by the First Amendment."[10] The basic precept of *Barclay* and *Dawson* -- that evidence of racial animus as the motivation for the substantive offense is a relevant sentencing factor -- applies to both capital and noncapital penalty enhancement provisions. *Mitchell*, 508 U.S. at 485-86.

Petitioner's motive for firing at the Fowlkes' house has at least as much relevancy to sentencing following a conviction for the crime of possession of a weapon for an unlawful purpose as would, for example, a prior conviction for an unrelated offense. *See McMillan*, *supra* (state court could consider, as a sentence enhancement factor, visible possession of a firearm during the felonies of which defendant was found guilty); *cf. Edwards v. United States*, 523 U.S. 511 (1998) (following a conviction for conspiracy to distribute cocaine, the trial court may consider the defendant's crack-related activities that constitute part of the "same course of

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[10] The evidence in *Barclay* established the defendant's membership in the Black Liberation Army and espoused desire to provoke a "race war," and was related to the murder of a white man for which Barclay was convicted. *Barclay v. Florida*, 463 U.S. at 942-44. The evidence in *Dawson*, in contrast, established only the defendant's abstract beliefs of white supremacy that had no bearing on the victim's murder, and could not be considered at sentencing. *Dawson v. Delaware*, 503 U.S. at 165-66.

conduct, or common scheme, or plan" as sentence-related "relevant conduct"). The *Apprendi* court found that the language "because of" as used in N.J.Stat.Ann. § 2C:44-3e ("The defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity") demands a causal link between the infliction of injury and bias motivation. (Pa26-27). "The requirements of the [Hate Crime] act are strict. It is not enough to show that during the commission of the crime the actor may have exhibited bias. The question is whether the purpose of the crime was to exhibit bias." (Pa26). This exacting nexus permits the sentencing court to glean the defendant's character at the moment he committed the offense, heightening the relevancy of this sentencing factor.[11]

Amici Curiae National Association of Criminal Defense Lawyers, *et al.*, cites no support for its theory that the sentencing judge "often has limited personal experience with racially motivated behavior" and for this reason such questions are better left to the jury. (*Amici* Brief at 14). The State suggests that the contrary is true: judges who regularly preside over criminal trials are more likely than the average juror to have knowledge of and understand hate crimes, and to possess the capacity to deal with them rationally and evenhandedly. As the Court noted in the context of death penalty sentencing, "it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." *Proffitt v. Florida*, 428

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[11] This statutorily-required nexus also overcomes the First Amendment concerns of *Dawson v. Delaware*, 503 U.S. at 166, that an individual's affiliation with a racist group be relevant to the crime for which he is being sentenced, or to the sentencing proceeding itself. *See Apprendi* at Pa2; *see also* n.10, *supra*.

U.S. 242, 252 (1976). And, as demonstrated by the sentencing judge in *Barclay v. Florida*, 463 U.S. at 948-50, who discussed Barclay's racial motive for the murder and compared it with his own experiences in the army in World War II, when he saw Nazi concentration camps and their victims, judges are no more likely than jurors to be insulated from the harsh realities of hate crimes in society.

Motive is not only highly relevant to the sentencing equation, it is verifiable in an adversarial proceeding. In *Jones*, 526 U.S. at 249, the Court noted in examining the traditional sentencing factor of recidivism that a prior conviction, "unlike virtually any other consideration used to enlarge the possible penalty for an offense, certainly unlike the factor [of serious bodily injury], ... must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." That a prior conviction is readily determined on the basis of an official court record is, however, unique to the nature of recidivism. Most sentencing factors do not come stamped with court seals attesting to their correctness or authenticity. Indeed, with regard to recidivist statutes, what is constitutionally required is not the procedure by which the sentencing court is alerted to the prior conviction, but that the prior conviction was obtained in a constitutional manner. *See ibid.* ("a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees"). Thus, *Jones* cannot be read to constitutionally-require that every sentencing factor resulting in an enhanced sentence be verifiable in the singular manner in which a prior conviction is verifiable.

Unlike prior convictions which are provable by court record, actual conduct is proven at an adversarial hearing where "the defendant is represented by counsel, counsel can put the State to its proof, examining its witnesses, rebutting its evidence, and testing the reliability of its allegations." *Nichols v. United States*, 511 U.S. 738, 760 (1994)

(Blackmun, J., dissenting). Petitioner here, in fact, had the benefit of just such an adversarial proceeding. *See subsection B iii, infra*. The method by which motive is proven is obviously different than that employed to prove the existence of a prior conviction, but it is a perfectly reliable one.

iii. N.J.Stat.Ann. § 2C:44-3e Grants Criminal Defendants Notice and Opportunity to be Heard, and thus Satisfies Due Process of Law.

To the extent that petitioner believes he is entitled to due process of law because of the "stigma of bigotry" (Pet. Brief at 38), the State notes that harm to one's reputation alone does not invoke a protectible liberty that triggers procedural due process rights. *Paul v. Davis*, 424 U.S. 693 (1976).[12] When stigmatic harm is coupled with the impairment of some additional interest, such as punishment, due process is of course implicated. *Id.* The State in fact afforded petitioner procedural due process, that is, notice and opportunity to be heard, before he was sentenced under the extended term provision of the Hate Crime Statute.

Because motive is a sentencing factor, and not an essential element of count eighteen of the indictment charging possession of a weapon for an unlawful purpose, petitioner was not entitled to receive notice by indictment of the possibility of an extended term based on racial animus. *See Almendarez-Torres, supra*. Nonetheless, petitioner certainly cannot claim he was surprised when the State formally filed its Notice of Motion to seek an extended term under

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[12] Not all criminal defendants would, as petitioner suggests, be appalled at being branded a "racist." Some proudly brand themselves with tattoos or join groups that openly advocate racism. *See, e.g., Dawson v. Delaware*, 503 U.S. at 161-62 (Dawson tattooed the words "Aryan Brotherhood" on the back of his right hand and tattooed multiple swastikas on his back, he painted a swastika on the wall of his prison cell, and he was a member of a white racist prison gang).

N.J.Stat.Ann. § 2C:44-3e. Petitioner admitted to the police that he fired shots into the Fowlkes' home because the residents were black and he was "giving them a message" that they were unwelcome in petitioner's neighborhood. (Pa174-78; Pa299). Pursuant to New Jersey's discovery rules, the State was required within fourteen days of the return of the indictment to make available to the defense for inspection "records of statements or confessions, signed or unsigned, by the defendant or copies thereof, and a summary of any admissions or declarations against penal interest made by the defendant that are known to the prosecution but not recorded." N.J. Court Rule 3:13-3(b), (c)(2). Broad state discovery rules, *see* N.J. Court Rules 3:13-3, thus insured that petitioner was in possession of his statement, as well as all other information pertaining to his case, whether inculpatory or exculpatory, other than work product, in the State's files well in advance of the time petitioner had to choose between pleading guilty to certain counts of the indictment or defending the charges against him and proceeding to trial. N.J. Court Rule 3:21-4(e) additionally required the prosecution to give notice to petitioner of its intention to seek an extended term under N.J.Stat.Ann. § 2C:44-3e by filing the appropriate motion at or prior to the negotiated plea.[13]

Not only did petitioner know of the State's intention to seek an extended term prior to the entry of his guilty plea (Ja21; Ja41; Ja43; Pa166), he testified in his own behalf (Pa236-79), offered the testimony of seven character witnesses and one expert witness (Pa182-235), and cross-examined the State's witnesses (Pa110-120; Pa178-181; Pa289-299) at the sentencing hearing before Judge Ridgway. Consequently, the Hate Crime Statute afforded petitioner the requisite procedural

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[13] Where a criminal defendant does not enter into a negotiated plea agreement, N.J. Court Rule 3:21-4(e) provides that a motion for an enhanced sentence "shall be filed with the court by the prosecutor within 14 days of the entry of defendant's guilty plea or of the return of the verdict."

safeguards of notice and opportunity to be heard at the sentencing stage. *Compare Specht v. Patterson*, 386 U.S. at 608 (commitment proceedings under Colorado Sex Offenders Act did not permit defendant an opportunity to present his own evidence or confront witnesses against him).

The particular standard of proof at the sentencing hearing prescribed by N.J.Stat.Ann. § 2C:44-3e -- preponderance of the evidence -- also comports with due process of law. *McMillan*, 477 U.S. at 91. While trials on guilt "always have been hedged in by strict evidentiary procedural limitations," *Williams v. New York*, 337 U.S. at 246, and require proof beyond a reasonable doubt of all elements, *In re Winship*, 397 U.S. at 364, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91. This is because criminal sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. *Id.* at 92 n.8. Petitioner's reliance on cases addressing the intermediate standard of proof of "clear and convincing" evidence required in particular civil actions [*Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (civil commitment); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (denaturalization)] is misplaced. The *McMillan* Court has rejected the argument that *Addington* requires application of the "clear and convincing" standard of proof in criminal sentencing proceedings. *McMillan*, 477 U.S. at 92 n.8.

As the *Apprendi* court below suggested in its review of the evidence presented at the sentencing hearing, the State far exceeded its statutory burden of proof by a preponderance of the evidence:

> [W]e are satisfied that no court could but conclude that the actor's purpose was, in fact, to intimidate the victims because of their color. The only question before the trial court was whether defendant's mental state, subjected to alcoholism, was such that he could not form the biased purpose. The trial court's review of the evidence submitted by defendant adequately disposed of that issue. There is no real question as to this actor's purpose in shooting into his neighbors' home.

(Pa27). And, despite the fact that at the extended term sentencing hearing before Judge Ridgway the State was not bound by the stringent evidentiary rules and high burden of proof required at a jury trial, *McMillan*, 477 U.S. at 91, no evidence was presented by the prosecution at the sentencing hearing that would have been inadmissible at a jury trial.

In its direct case, the State introduced the testimony of Michael Fowlkes, the victim, who gave a factual account of the shootings and described the resulting structural damage to his house. (Pa98-121).[14] Detective Dennis D'Augostine's testimony on direct was limited to the content of petitioner's statement to the police, namely, that petitioner "knew that there were black people who lived at that residence because he's seen them in the yard. And he was giving them a message that they were in his neighborhood." (Pa174-78). In response to petitioner's defense that his confession was prompted by drugs, alcohol and fear of imprisonment, the detective explained on rebuttal that petitioner "clearly understood" his *Miranda* rights, he was not under the influence of drugs or alcohol, and he was never threatened or given promises in exchange for a confession. (Pa281-300). Notably, petitioner stipulated that his confession complied

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[14] Potentially inadmissible hearsay was introduced by defense counsel on cross-examination of Mr. Fowlkes. (Pa111-13).

with *Miranda*. (Pa288-89). Thus, while the statutorily-prescribed threshold burden of proof that the prosecution shouldered was by a preponderance of the evidence, N.J.Stat.Ann. § 2C:44-3e, the State obviously surpassed this requirement, achieving the "clear and convincing" standard, *see Kikumura v. United States*, 918 F.2d 1084, 1100-02 (3d Cir. 1990), if not the "beyond a reasonable doubt" standard required to prove elements of the underlying offense. *In re Winship*, *supra*. There is no doubt in this case that the additional extended term was properly, and constitutionally, imposed.

The actual increase in sentence petitioner received under N.J.S.A. § 2C:44-3e -- two years -- suggests no breach of constitutional limits. Petitioner's claim that the sentencing statute had the effect of doubling his maximum sentence for the primary offense (Pet. Brief at 5) is misleading. Petitioner entered a guilty plea to possession of a weapon for an unlawful purpose, N.J.Stat.Ann. § 2C:39-3a, a second degree offense. The ordinary sentencing range for a second degree crime is between five and ten years. N.J.Stat.Ann. § 2C:43-6a(2). The extended sentencing range for a second degree crime is between ten and twenty years. N.J.Stat.Ann. § 2C:43-7a(3). Petitioner's actual maximum sentence imposed by Judge Ridgway was twelve years, only a two-year increase above the ten-year ordinary maximum term that the trial court could have imposed following a conviction for second degree possession of a weapon for an unlawful purpose without an extended term.[15]

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[15] The Court has noted, but never addressed, the divergence of opinion among the federal courts as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence to satisfy due process. *Almendarez-Torres*, 523 U.S. at 248; *United States v. Watts*, 519 U.S. at 156-57. Petitioner's two-year increase in sentence from an ordinary maximum of ten years to an enhanced term of twelve years is not (continued...)

But even if petitioner's maximum sentence were in fact doubled from ten to twenty years because of the extended term provision, that sentence would still fall within constitutional parameters. In *Almendarez-Torres,* 523 U.S. at 226-27, the Court upheld a potential eighteen-year increase to a two-year sentence under 8 U.S.C. § 1326. In *Monge*, 524 U.S. at 729, the Court approved a California law which permits the sentencing judge to double a sentence from seven to fourteen years following a conviction for using a minor to sell drugs where the offender previously has been convicted of a qualifying felony. Neither the potential length of the maximum term that could be imposed pursuant to N.J.Stat.Ann. § 2C:44-3e nor the term actually imposed following petitioner's plea of guilty to a second degree offense transgresses constitutional boundaries.

Several states have enacted hate crime penalty enhancement statutes which, like New Jersey's, designate motive as an aggravating factor to be considered by the sentencing court in increasing the prison term for the predicate conviction. Mont. Code Ann. § 45-5-222 (1999) (gives sentencing court discretion to impose an additional term of two to ten years to run consecutively to the term imposed for the predicate offense); Nev.Rev.Stat. § 193.1675 (1995) (gives sentencing court discretion to impose an additional term not to exceed 25% of the term of imprisonment prescribed by statute for the predicate crime; specifically "does not create a

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[15](...continued)
disproportionate to the offense to which he pleaded guilty, and thus does not present an "exceptional case." *Cf., e.g., United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999), *petition for cert. filed sub nom. United States v. Reed*, 68 U.S.L.W 3433 (filed December 29, 1999) (No. 99-1096) (seven-level adjustment under federal sentencing guidelines which increased potential maximum term of incarceration by 260% presents an exceptional case); *Kikumura v. United States*, 918 F.2d at 1100-02 (increase under federal sentencing guidelines from about 30 months to 30 years presents an exceptional case).

separate offense but provides an additional penalty for the primary offense"); Tex. Penal Code Ann. § 12.47 (Vernon 1994) (when sentencing court finds that the offense, other than a first degree felony or a Class A misdemeanor, was committed because of bias or prejudice, the punishment for the offense is increased to the punishment prescribed for the next highest category of offense).

That other jurisdictions have enacted hate crime statutes expressly making subjective motivation an essential element of the crime, *see, e.g.*, Fla.Stat.Ann. § 775.085(3) (West 1991); *Richards v. State*, 643 So.2d 89 (Fla. Dist. Ct. App. 1994); and Wis. Stat. Ann. § 939.645(3) (West 1996); *Mitchell*, 508 U.S. at 481 n.1, does not affect the validity of New Jersey's statutory scheme.[16] States are of course free to

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[16] Petitioner notes that the harassment statute, N.J.Stat.Ann. § 2C:33-4d (West 1995), which elevates harassment from a petty disorderly persons offense to a fourth degree crime if the defendant acted with a biased purpose, and the assault statute, N.J.Stat.Ann. § 2C:12-1e (West 1995), which elevates simple assault from a disorderly persons offense to a fourth degree crime if the defendant acted with a biased purpose, appear in that part of the Code defining substantive offenses. Petitioner's claim that these statutes create new crimes based on bias (Pet. Brief at 28) was rejected in *State v. Mortimer, supra*, in which the Supreme Court of New Jersey found that N.J.Stat.Ann. § 2C:33-4d is a "victim-selection" or "penalty enhancement" provision that increases the penalty associated with the underlying criminal act, such as assault, trespass, or battery, where a biased motivation is found, but does not create a substantive offense. *State v. Mortimer*, 135 N.J. at 525, 641 A.2d at 261-62.

To increase the punishment for simple assault or harassment motivated by racial animosity the New Jersey Legislature by necessity had to incorporate the penalty enhancers within the respective statutes defining these offenses, rather than lumping simple assault and harassment among the crimes eligible for extended term sentencing under N.J.Stat.Ann.§ 2C:44-3e. Extended term sentencing is applicable only to a person "convicted of a crime." N.J.Stat.Ann. § 2C:43-7a (West 1995). (continued...)

offer greater protection than provided by the United States Constitution based on their own state constitutions or public policy. *Nichols v. United States*, 511 U.S. at 748 n.12. "[T]he fact that the States have formulated different statutory schemes to punish" crimes motivated by racial bias "is merely a reflection of our federal system, which demands '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement.'" *McMillan*, 477 U.S. at 90 (citing *Spencer v. Texas*, 385 U.S. 554, 566 (1967)); *accord State v. Krantz*, 788 P.2d 298, 305 (Mont.), *cert. denied*, 498 U.S. 938 (1990). That New Jersey's "particular approach has been adopted in few other States does not render [New Jersey's] choice unconstitutional" under a due process claim. *McMillan*, 477 U.S. at 90; *see also Spaziano v. Florida*, 468 U.S. at 464 (the Court upheld a death penalty sentencing scheme adopted by only three of thirty-seven jurisdictions with capital sentencing statutes). This Court should be "unwilling to say that there is any one right way for a state to set up its [hate crime] sentencing scheme." *Spaziano v. Florida*, 468 U.S. at 464.

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[16](...continued)
"Crimes" are defined in the Code as offenses "for which a sentence of imprisonment in excess of 6 months is authorized" and are designated "as being of the first, second, third or fourth degree." N.J.Stat.Ann. § 2C:1-4a (West 1995). Disorderly persons offenses and petty disorderly persons offenses "are not crimes within the meaning of the Constitution of this State." N.J.Stat.Ann. § 2C:1-4b (West 1995). Persons accused of disorderly persons offenses and petty disorderly persons offenses have "no right to indictment by a grand jury nor any right to trial by jury on such offenses" and "[c]onviction of such offenses shall not give rise to any disability or legal disadvantage based on conviction of a crime." *Ibid.* Thus, "the more serious charge of assault or harassment with the purpose to intimidate because of status triggers the right to grand jury indictment and jury trial." *State v. Apprendi*, 304 N.J. Super. at 164 n.8, 698 A.2d at 1274 n.8 (Wecker, J., dissenting) (Pa72).

In sum, New Jersey's Hate Crime Statute creates a constitutionally-valid statutory scheme permitting the sentencing court to impose an extended term of imprisonment once it is satisfied by a preponderance of the evidence that the underlying crime was racially motivated. The New Jersey Legislature did not create a new element of any offense that must be proven beyond a reasonable doubt, but took "one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor." *McMillan,* 477 U.S. at 89-90. The conclusion reached by the Supreme Court of New Jersey that the Hate Crime Statute does not overstep the constitutional limits erected by this Court is firmly supported by this Court's decisions addressing the "sentencing factors versus elements" debate and insures that petitioner's constitutional rights were fully protected.

CONCLUSION

The judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

JOHN J. FARMER, JR.
Attorney General of New Jersey
Counsel for Respondent

LISA SARNOFF GOCHMAN
Deputy Attorney General
Counsel of Record

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In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Jersey

REPLY BRIEF OF PETITIONER

JEFFREY T. GREEN
TIMOTHY D. HAWKES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
(856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-6181

Counsel for Petitioner

March 16, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF OF PETITIONER

I. ALTHOUGH THE LAW RECOGNIZES MOTIVE AND INTENT AS DISTINCT CONCEPTS, THE "PURPOSE TO INTIMIDATE" ELEMENT OF N.J. STAT. ANN. § 2C:44-3e. TRANSGRESSES BOTH CONCEPTS.

Respondent attempts to draw a meaningful distinction between motive and intent in order to dismiss the "purpose to intimidate" element of N.J. Stat. Ann. § 2C:44-3e. as a mere "motive" factor that can be relegated to the sentencing phase. But the Respondent paints with too broad a brush, suggesting a clear distinction where there is none. Although the law recognizes motive and intent as distinct concepts, the "purpose to intimidate" element of N.J. Stat. Ann. § 2C:44-3e. cannot be so easily classified. Contrary to Respondent's unsupported declaration, "motive" is by no means exclusively a sentencing factor. See, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) ("[T]he offense of treason . . . may depend very much on proof of motive.") (citing *Haupt* v. *United States*, 330 U.S. 631 (1947)); *Screws* v. *United States*, 325 U.S. 91, 101 (1945) ("An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. And that issue must be submitted to the jury under appropriate instructions.") (citations omitted) (plurality opinion).[1]

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[1] The *Screws* case is instructive here because it involved a federal statute, 18 U.S.C. § 52, that prohibited individuals acting under color of law from "willfully" depriving a person of his or her rights on account of that person's "color, or race." 325 U.S. 91, 93 (1945). Although the statute used "willful" rather than the "purpose[ful]" language of N.J. Stat. Ann. § 2C:44-3e., the Court recognized that the statute created a specific intent (or heightened *mens rea*) crime; consequently, the Constitution required that "the essential ingredients of the only offense on which the conviction could rest" be submitted to the jury. *Id.* at 107.

Respondent attempts to draw a distinction between motive and intent in the following fashion: " 'Motive is the moving course, the impulse, the desire that induces the defendant to criminal action. It is distinguished from intent, which is the *purpose* to use a particular means to effect a certain result.' " Resp. Br. 31 (emphasis added) (quoting *Allen* v. *City of Los Angeles*, 92 F.3d 842, 850 (9th Cir. 1996)). This only proves Petitioner's point, as N.J. Stat. Ann. § 2C:44-3e. specifically employs the term "purpose," rather than "motive." See *id.* (using the words "purpose to intimidate"). The definition of "intent" proposed in the brief by *Amici Curiae* Brudnick Center on Violence and Conflict et al., also supports Petitioner's contention that N.J. Stat. Ann. § 2C:44-3e. defines an essential element of the substantive offense: "In its simplest definition criminal intent refers to the *mens reas* or the level of awareness or purposefulness one has in relation to the criminal act or *actus reus*." *Id.* at 5-6. Again, at page 6 n.2, these *Amici* explain, " '[s]pecifically, intent concerns the mental state provided in the definition of an offense for assessing the actor's culpability with respect to the elements of an offense.' " *Id.* (quoting Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law* 108 (1999)). The "purpose to intimidate" element in N.J. Stat. Ann. § 2C:44-3e. "concerns the mental state . . . for assessing the actor's culpability" despite the State's efforts to treat it as something less than an element of the offense. Thus, even the authorities cited to support N.J. Stat. Ann. § 2C:44-3e. suggest that *mens rea*, intent or purpose are functionally identical.

The "purpose to intimidate" language of N.J. Stat. Ann. § 2C:44-3e. describes something more than "motive" in its narrowest sense. It is a purpose to effect a certain result – intimidation. Respondent cannot escape the requirements of due process by merely labeling a specific intent or heightened *mens rea* element as a "motive." It is the fundamental character of the element, not its label, that triggers the protections afforded by the Constitution. New Jersey has every right to criminalize acts of violence

committed because of a purpose or motive to discriminate on the basis of race, but it cannot, without violating bedrock constitutional principles, treat the hate element of a hate crime statute as a mere sentencing factor subject to a judicial determination by a mere preponderance of the evidence.

Respondent merely begs the question presented by repeatedly claiming that "evidence of racial animus as the motivation for the substantive offense is a relevant sentencing factor." See Resp. Br. 35. If N.J. Stat. Ann. § 2C:44-3e. merely instructed the judge to consider evidence of bias in determining the appropriate sentence for the underlying crime, the statute would not implicate constitutional concerns. This case, however, presents a fundamentally different question – the doubling of a statutory maximum sentence based on a preponderance determination of a heightened *mens rea* element. Respondent's Brief never comes to grips with that fundamental distinction.

II. THE DEATH PENALTY CASES CITED BY RESPONDENT AND *AMICUS CURIAE* ARE READILY DISTINGUISHABLE FROM THE CASE *SUB JUDICE*.

Respondent notes that courts have considered racial bias as a factor in determining an appropriate sentence in capital murder cases, but to say that racial bias *may* be considered at sentencing does not speak to the constitutional limits on state authority to redefine substantive elements as mere sentencing factors. The death penalty cases cited by Respondent and by *Amicus* United States do not support the constitutionality of N.J. Stat. Ann. § 2C:44-3e. For example, *Williams* v. *New York*, 337 U.S. 241 (1949), cited repeatedly by the Respondent, recognized that the task of a sentencing judge is to determine the appropriate punishment *"within fixed statutory or constitutional limits."* *Id.* at 247 (emphasis added). In *Williams*, the defendant was convicted after a jury trial of first-

degree murder, an offense automatically punishable by death unless the jury recommended life imprisonment, in which case the judge had discretion to accept the jury's recommendation or to impose a death sentence. *Id.* at 242. *Barclay* v. *Florida*, 463 U.S. 939, 944 (1983), and *Spaziano* v. *Florida*, 468 U.S. 447, 452 (1984) involved a similar statute. In each case, the jury – not the judge – made the initial determination, based on proof beyond reasonable doubt, that the defendant was *punishable* by death, even if they ultimately recommended that the defendant receive life imprisonment. By concluding that the defendant had committed first degree murder, the jury in each case effectively set the maximum penalty at death, leaving to the judge at sentencing the ultimate authority to choose between the sentences authorized by statute.

In contrast, N.J. Stat. Ann. § 2C:44-3e. permits a sentencing judge to impose a sentence far in excess of the statutory limit for the underlying offense. A truly analogous death penalty statute would provide for life imprisonment for first degree murder (thus setting the statutory maximum for the offense at life imprisonment) and a separate "penalty enhancing provision" calling for the imposition of a death sentence if the trial judge made certain determinations of the defendant's mental state based on a mere preponderance of the evidence. There is no doubt that such a statute would violate the Fifth and Sixth Amendment rights of criminal defendants; similarly, there should be no doubt here that N.J. Stat. Ann. § 2C:44-3e. violates those same constitutional protections.

III. A COMPARISON WITH THE FEDERAL SENTENCING GUIDELINES HIGHLIGHTS THE FLAWED APPROACH OF N.J. STAT. ANN. § 2C:44-3e.

N.J. Stat. Ann. § 2C:44-3e. simply does not create a garden-variety sentencing factor. Unlike traditional sentencing factors, the "purpose to intimidate" element of the New Jersey statute heightens the statutory maximum

punishment and does so, not based on some objectively verifiable determination (such as a prior conviction), but based on a preponderance determination of a criminal defendant's mental state. A comparison with the federal sentencing guidelines demonstrates the serious constitutional defects in New Jersey's approach. The federal statute permits an increase in the base offense level only if the *finder of fact* determines *beyond a reasonable doubt* that the crime was a hate crime. See 28 U.S.C.A. § 994, Historical and Statutory Notes.[2] Furthermore, under the guidelines, "the sentence may be imposed at any point within the applicable guideline range, provided that the sentence . . . . is not greater than the statutorily authorized maximum sentence. . . . " *U.S. Sentencing Guidelines Manual* § 5G1.1 (1998). Thus, the aggravating or mitigating factors in the guidelines serve only to increase or decrease a sentence *within* the maximum sentence provided by the statute. See Lucien B. Campbell and Henry J. Bemporad, *An Introduction to Federal Guideline Sentencing*, 10 Fed. Sent. R. 323, 323-24 (1998) ("Under guideline sentencing, the court's discretion to fix sentence is cabined within a guideline range that may be a small fraction of the statutory limit. . . . The guideline sentencing range does not supplant minimum and maximum sentences prescribed by statute.").

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[2] As indicated, Pet. Br. 25 n.10, the vast majority of states have recognized the constitutional implications of the determination of a defendant's biased purpose in committing a crime and have adopted similar procedural safeguards. *See, e.g., Wisconsin* v. *Mitchell*, 508 U.S. 476, 489 (1993) (observing that the Wisconsin statute at issue in that case, Wis. Stat. § 939-645, required the jury to find race-based motive for the sentence enhancing provisions to go into effect).

IV. A REVIEW OF THE RELEVANT SUPREME COURT CASES SUPPORTS THE PROPOSITION THAT N.J. STAT. ANN. § 2C:44-3e. VIOLATES THE CONSTITUTIONAL RIGHTS OF CRIMINAL DEFENDANTS.

The bedrock ruling of *In re Winship*, 397 U.S. 358 (1970), was that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364. Respondent's brief selectively recites the Court's precedents and fails to successfully distinguish the one case most directly on point, *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). *Mullaney* strongly supports the proposition that N.J. Stat. Ann. § 2C:44-3e. violates the constitutional rights of criminal defendants. For the reason stated here, *Mullaney* addressed the question of what procedural protections apply where a "heightened mens rea," motive or purpose question arises. In *Mullaney*, the Court considered a Maine statute that "conclusively implied" that all homicides were committed with malice, unless the defendant was able to rebut this presumption. The defendant presented no evidence in the case, but argued that he had acted without intent and, in the alternative, that he had acted in the heat of passion. *Id.* at 685. Central to the Court's ruling was the fact that the structure of the State's homicide law distinguished between those who had acted with malice and those who had acted for a less blameworthy or less culpable reason. While having acted volitionally, persons who acted without malice were guilty of "voluntary" or even "involuntary" manslaughter. *Id.* at 691-96.

In its holding, the Court invalidated the State's application of its "presumed malice" rule, declaring that "[b]y drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in *Winship*." *Id.* at 698. Accordingly, *Mullaney* required that the State prove beyond a reasonable

doubt the charge that the defendant had acted with a heightened standard of intent – that is, maliciously – and was thereby subject to a substantially increased maximum punishment.

The Court's constitutional holding in *Mullaney* cannot be confined solely to a declaration that Maine could not constitutionally shift the burden of proof of having acted *without* malice to the defendant. If that in fact had been the holding, then the opinion would have left unanswered the question of what level of burden the State shouldered in proving its claim that the defendant had acted not only voluntarily, but also maliciously. As noted above, however, the Court's opinion does not leave that question unanswered. It states quite plainly that State must demonstrate its allegation of malice beyond a reasonable doubt. *Id.* at 698. The constitutional principle thereby fashioned in *Mullaney* was not only that the State was prohibited from shifting the burden of proof of a heightened *mens rea* charge to the defendant, but also that the State *retained* the burden of proving its charge beyond a reasonable doubt. Moreover, as in *Winship*, the Court emphasized that the application of this constitutional principle defied formalistic attempts to diminish the operation and effect of the law. *Id.* at 699 ("*Winship* is concerned with substance rather than this kind of formalism.").

Here, as in *Mullaney*, the State of New Jersey has created a statutory scheme which distinguishes culpability based upon the *mens rea* with which the defendant committed the charged acts. Under N.J. Stat. Ann. § 2C:44-3e., petitioner was subjected to a sentence twice what he would otherwise have received. This was based solely upon a charge that his intent, his purpose, was more culpable, and more malicious, than that of merely possessing a weapon with some undefined but nevertheless unlawful purpose. The State's placement of such a distinction within a sentence enhancement statute constitutes precisely the type of formalism decried in *Winship*

and *Mullaney*.[3] Even assuming that the State may engage in the formalistic, but legislatively convenient, expedient of grouping enumerated crimes in which this distinction between generalized intent and more culpable forms of intent makes a difference, the Court cannot ignore the " 'operation and effect of the law as applied and enforced by the State.' " *Id.* at 699 (quoting *St. Louis S.W. Ry. Co.* v. *Arkansas*, 235 U.S. 350, 362 (1914)).

The Court's holding two Terms later in *Patterson* v. *New York*, 432 U.S. 197 (1977), did not alter the fundamental holding in *Mullaney*. At issue in *Patterson* was only whether the burden of proving an affirmative defense (in that case extreme emotional disturbance), could constitutionally rest with the defendant. As noted by the Court in both *Mullaney* and *Patterson*, the practice in many states was that the prosecution must, beyond a reasonable doubt, affirmatively disprove the presence of an affirmative defense. *Mullaney*, 421 U.S. at 702 & n.30; *Patterson*, 432 U.S. at 211. In *Patterson* the Court "decline[d] to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused." 432 U.S. at 210. This case, however, like *Mullaney*, does not address the presence or absence of an affirmative defense. Instead, it concerns the State's affirmative *charge* that petitioner acted not only with a "general" unlawful intent but with a specific racial bias.

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[3] Indeed, the *Mullaney* Court anticipated, with disapproval, the very type of statutory scheme New Jersey has imposed here. The Court noted that many states differentiate among levels of *mens rea* with respect to assault crimes. 421 U.S. 684, 699 n.24 (1975). It observed that "[i]f *Winship* were limited to a State's definition of the elements of a crime, these states could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation – *e.g.*, intent to kill or intent to rob." *Id.*

The *Patterson* Court also acknowledged the overarching principle that a state may not, in formalistic fashion, define away the fundamental aspects of its charge and thereby "reallocate burdens of proof." *Id.* "[T]here are obviously constitutional limits beyond which the States may not go in this regard." *Id.* Here, those limits have been exceeded. New Jersey has removed to the sentencing stage the most fundamental aspect of the "hate crimes" it charges; namely, that the defendant was motivated by some specific form of hatred – targeted toward a specific, identified group – rather than a general unlawful intent, and that he acted with the further purpose to intimidate that group. In its operation and effect, the state's scheme relieves the State's burden to prove beyond a reasonable doubt what is certainly a traditional "element" of crime – the defendant's mental state.

In *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986), the Court found constitutional a Pennsylvania provision which accorded discretion to the sentencing court to impose, after a finding based upon a preponderance of the evidence, a mandatory minimum incarceration period upon a defendant who had "visibly possessed a firearm" during the course of the underlying offense for which the jury had found the defendant guilty. *Id.* at 84-91. As noted in the Court's decision last Term in *Jones* v. *United States*, the *McMillan* Court explicitly based its holding on the fact that the Pennsylvania provision in dispute only resulted in mandatory minimum sentences that were within the maximum range of punishment. 119 S. Ct. 1215, 1223 (1999). "[I]t did observe that the result might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact." *Id.* at 1223 (citing *McMillan*, 477 U.S. at 88 (observing that the Pennsylvania scheme "operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm")).

Importantly, the *McMillan* Court did not diminish the constitutional principles established in *Winship*, *Patterson*, and *Mullaney*. "As *Patterson* recognized, of course, there are constitutional limits to the State's power in this regard [defining crimes and prescribing penalties]; in certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." 477 U.S. at 86. Indeed, the *McMillan* Court cited and distinguished *Mullaney* as one such instance precisely because Maine's implied malice statute subjected the defendant to a greatly increased maximum penalty. *Id.* at 87. Nor did the Court in *McMillan* construe the constitutional principles at work to limit solely the States' authority to reallocate burdens of proof, explaining that due process may forbid "*reduction* of burdens of proof in criminal cases" as well as reallocations. *Id.* at 86 (emphasis added).[4]

The *McMillan* Court also approved of Pennsylvania's statute on the ground that its "visible possession of a firearm" sentencing provision did not create a presumption of guilt or strip away the presumption of innocence. To be sure, no facts were presumed under the Pennsylvania statute in *McMillan* nor are they presumed under N.J. Stat. Ann. § 2C:44-3e. Petitioner in *McMillan*, however, failed to identify an important effect of removing crucial fact findings to the sentencing courts and reducing the burden of proof to a mere preponderance standard. Sentencing courts do not treat the presumption of innocence as applicable to sentencing proceedings. The presumption of innocence is an instruction given only to juries. The state statutory schemes that remove findings of fact to

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[4] Contrary to the assertion made by Respondent, Resp. Br. 10, *McMillan* did not establish a cut-and-dried constitutional "test" to define the parameters of permissible state authority to define crimes and prescribe penalties. Rather, the *McMillan* Court identified a number of factors which formed its decision in that particular case.

sentencing therefore do operate to discard the presumption of innocence, even if they do not do so expressly.

Under the reasonable doubt standard, criminal sanctions cannot be imposed unless the state and the state alone provides sufficient evidence to prove a fact beyond a reasonable doubt. Although a defendant *may* present evidence to rebut the state's evidence, he or she is not required to do so. The standard considers whether the state's evidence is sufficient, and although evidence presented by the defendant affects the calculus, it is not an essential component of it (*i.e.*, a defendant is still protected by the standard even if he or she presents no evidence.). By contrast, a preponderance standard requires the finder of fact to weigh competing evidence. If the state presents *any* evidence, the defendant must rebut that evidence or else the state will be held to have met its burden. Thus, the preponderance standard *increases* the defendant's burden to prove that he is innocent and correspondingly *decreases* the state's burden to prove guilt. Cf. *McMillan*, 477 U.S. at 87 ("Nor does [the Act] relieve the prosecution of its burden of proving guilt."). Put simply, under a preponderance standard, the presumption of innocence can mean only that at the outset the scales of justice are even.

The sentencing proceedings in this case amply demonstrate how the application of a preponderance standard strips away the presumption of innocence and fundamentally alters the parties' relative positions in a criminal case. Prior to sentencing, Petitioner offered extensive character evidence, his own testimony, and the testimony of an expert witness. The prosecution, on the other hand, simply offered evidence to negate that offered by Petitioner, the testimony of the interrogating officer to negate Petitioner's claims of coercion and the testimony of Mr. Fowlkes to negate Petitioner's claims that in his altered mental state the door alone triggered a destructive impulse. Judge Ridgway's discussion suggests that Petitioner's admission in his plea that he had fired at the house on two occasions "to scare someone"

was alone sufficient to tip the scales in favor of a finding that Petitioner had the requisite mental state to impose an enhanced sentence. Pet. App. 143a-144a.

In *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), this Court indicated that an increase in the maximum sentence *alone* will not suffice to render a sentencing factor a *de facto* element that must be submitted to a jury and proved beyond a reasonable doubt. See *id.* at 243-45. But N.J. Stat. Ann. § 2C:44-3e. does far more than the sentencing factor at issue in *Almendarez-Torres*. *Almendarez-Torres* addressed recidivism: a sentencing factor that, although it alters the maximum penalty for the crime committed, "is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." *Id.* at 243. Like the sentencing factor at issue in *McMillan*, recidivism is a "simple, straightforward issue susceptible of objective proof." 477 U.S. at 84.[5] By contrast, the "purpose to intimidate" in N.J. Stat. Ann. § 2C:44-3e. is not a traditional sentencing factor, nor does it present a "simple, straightforward issue susceptible of objective proof." *Id.*

Most recently, in *Jones*, 119 S. Ct. at 1221, the Court interpreted various subsections in the federal carjacking statute, 18 U.S.C. § 2119, to create aggravated forms of the crime rather than mere sentence-enhancing factors. 119 S. Ct. at 1221. In the course of its analysis, the Court suggested the following constitutional standard for determining whether a statute creates a substantive element of an offense or merely a sentencing factor: "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment,

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[5] As the Court recognized subsequently in *Jones*, recidivism is unique in that "unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before [the Court in *Jones*], a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 119 S. Ct. 1215, 1227 (1999).

submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 1224 n.6.[6]

Like the "serious bodily injury" element in *Jones*, N.J. Stat. Ann. § 2C:44-3e. increases the maximum penalty for a crime based on a judge's determination of a crucial fact under a preponderance of the evidence standard. Furthermore, N.J. Stat. Ann. § 2C:44-3e. "not only provide[s] for steeply higher penalties, but condition[s] them on further facts (injury, death) that seem quite as important as the elements in the [principal offense]." *Id.* at 1218. Indeed, the "hate" element of a hate crime is as important, if not more important, than the elements of the underlying offense, and a judicial finding of that element carries roughly the same criminal sanction (*i.e.*, it effectively doubles the penalty for first, second, and third degree crimes).

V. N.J. STAT. ANN. § 2C:44-3e. VIOLATES THE FIFTH AMENDMENT OF THE CONSTITUTION BY DENYING CRIMINAL DEFENDANTS NOTICE BY INDICTMENT OF GRAND JURY.

The State's interpretation of N.J. Stat. Ann. § 2C:44-3e. would allow the prosecution to avoid mentioning the possible enhancement to the grand jury and to ignore it in an indictment. The defense first received notice on May 3, 1995 that the prosecution would seek an extended prison term. New Jersey Rules of Court 3:21-4(e) states that "[a] motion pursuant to N.J. Stat. Ann. § 2C:44-3 . . . for the imposition of an extended term

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[6] The Court did not attempt to establish a definitive constitutional rule, rather, it articulated the standard to clarify its constitutional concerns and to support its application of the doctrine of constitutional doubt. *Jones*, 119 S. Ct. at 1223 & n.6. Nevertheless, it reflects the Court's most recent pronouncement on the issues squarely presented by this appeal and reiterates the Court's commitment to the principles established in *Winship*.

of imprisonment . . . shall be filed with the court by the prosecutor within 14 days of the entry of defendant's guilty plea or of the return of the verdict. Where the defendant is pleading guilty pursuant to a negotiated disposition, the prosecutor shall make the motion at or prior to the plea." N.J. Ct. R. 3:21-4(e). The prosecutor handed the defendant and defense counsel a motion for an extended term of imprisonment on the date the plea of guilty was entered, July 24, 1995. The plenary hearing on the issue of extended imprisonment was held September 5, 1995.

Had the Petitioner been given notice in the indictment of the racial animus charge, he would have had greater opportunity to consider the overall circumstances involving the strategy of trial and of any bargain proposed by the State. Any interview and research which the defendant might have conducted during this period might well have significantly been redirected and included much more direct concern with the defendant's alleged racist motives. This "sentence by ambush" technique clearly violates any notion of fair notice and due process. Nothing in the statute – and certainly no concession in the State's brief – would require notice prior to the day of conviction.

Accordingly, N.J. Stat. Ann. § 2C:44-3e. was drafted by the New Jersey Legislature to allow a prosecuting attorney to make an application for an extended term of imprisonment *after* a person "has been convicted of a crime." See Pet. Br. 2. This is significant for two reasons. First, in violation of the Fifth Amendment of the United States Constitution, this procedure of waiting until after a conviction before making the hate crime application effectively denies a defendant his fundamental right to have the racial animus charge reviewed by an independent Grand Jury. Secondly, it denies both the defendant and his defense counsel *reasonable* notice to properly contemplate the efficacy of the plea bargain before it was entered into by the defendant.

Indictment by a Grand Jury affords defendants the fundamental constitutional protection of having an independent body comprised of members of the community at large review the pending charges against him or her, which is separate from the government or the prosecution. See *United States* v. *Calandra*, 414 U.S. 338, 342-46 (1974).

The institution of the Grand Jury is a protector of citizens against arbitrary and oppressive governmental action. Notice by indictment also affords trial counsel the ability to adequately prepare and to counsel a defendant on the quality of the plea bargain against the backdrop of the extended term application. In its defense of N.J. Stat. Ann. § 2C:44-3e., the State can only claim that Petitioner and his counsel had *some* actual notice of the State's intention to seek an extended term prior to the entry of his guilty plea. Resp. Br. 39.[7] But again N.J. Stat. Ann. § 2C:44-3e. does not require such notice and the larger question before the Court remains whether such notice is a required procedural protection.

On this record, no appropriate notice was required and none was given in a timely fashion. Clearly a notice *by indictment* of a hate crime violation would have given defense counsel a more reasonable time to contemplate the parameters of the guilty plea and guide the defendant on the value of the plea bargain. See JA 2 (indicating that the indictment occurred on January 19, 1995, some seven months before the entry of the plea). Had the defendant been given notice of the racial animus charge by indictment, he would have had ample opportunity to consider the overall circumstances involving the strategy of the plea bargain and exposure to a potentially doubled prison sentence.

Given the procedural deficiencies of this statute, it is entirely probable that other defendants exposed to the hate crime law in the State of New Jersey will not be

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[7] *See* JA 21, 41, 43; Pet. App. 166a.

given prior notice of an application for an extended term of imprisonment until after conviction. That would make the scenario akin to the factual scenario in *Jones* v. *United States*, 119 S. Ct. 1215 (1999), wherein the defendant became aware that he was exposed to an extended term of imprisonment of 25 years at the time of a pre-sentence investigation report, indicating that because one of the victims had suffered a serious "bodily injury", he would be exposed to an additional 10-year prison term. *Id.* Previously, the defendant had been told at his arraignment by a magistrate judge that he had faced a maximum charge of 15 years on the carjacking violation. *Id.* at 1218. Under N.J. Stat. Ann. § 2C:44-3e., a defendant can enter into a plea bargain having absolutely no idea that his guilty plea will subsequently trigger an application from the prosecuting attorney for an extended term of imprisonment for up to twice the maximum sentence that would have been imposed. In such circumstances, defense counsel is not reasonably able to advise a defendant on the appropriateness of a guilty plea. For this reason alone, the hate crime law must be declared unconstitutional.

VI. N.J. STAT. ANN. § 2C:44-3e. SUBJECTS CRIMINAL DEFENDANTS TO A SUBSTANTIAL INCREASE IN THE MAXIMUM SENTENCE.

The *amicus* brief of the Anti-Defamation League ("ADL") misinterprets the sentencing scheme under N.J. Stat. Ann. § 2C:44-3e. Contrary to the suggestion of the ADL, see ADL Br. 10 n.7, 20, Judge Ridgway did not have the option to select between two alternative punishments for a second degree crime under N.J. Stat. Ann. § 2C:43-6a(2), one of which gave the court a five to ten year sentencing range and the other of which gave him a ten to twenty year sentencing range. Possession of a weapon for an unlawful purpose, the crime at issue here, is a second-degree offense. N.J. Stat. Ann. § 2C:39-3a. Under New Jersey law, a person convicted of a second-

degree crime must be sentenced "for a specific term of years which shall be fixed by the court and shall be between five years and ten years." N.J. Stat. Ann. § 2C:43-6a(2). The New Jersey State Legislature has further articulated that there is a presumptive term of seven years for conviction of a first time offender (like Petitioner) for a second degree crime. See N.J. Stat. Ann. § 2C:44-1. Judge Ridgway concluded during the sentencing hearing that there were two aggravating factors and three mitigating factors.[8] JA 48. Because the sentencer found more mitigating factors than aggravating factors, Mr. Apprendi would probably have received a sentence of seven years. Thus, N.J. Stat. Ann. § 2C:44-3e. effectively raised his sentence from a presumptive term of seven years to twelve years, and raised the maximum sentence from a possibility of ten years to a possibility of twenty years. Mr. Apprendi ultimately received a twelve-year sentence, roughly double what he would have received had N.J. Stat. Ann. § 2C:44-3e. not been applied.

VII. THE RULE PROPOSED BY THE UNITED STATES WOULD STRIP CRIMINAL DEFENDANTS OF FUNDAMENTAL CONSTITUTIONAL PROTECTIONS.

The brief of the United States attacks the rule proposed in *Jones*, namely, that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a

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[8] The mitigating factors were as follows: #6 (the defendant has compensated or will compensate the victim of his conduct for the damage or injury that he sustained or will participate in a program of community service), #7 (the defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present offense), and #8 (the defendant's conduct was the result of circumstances unlikely to recur). Pet. App. 159a-160a.

jury, and proven beyond a reasonable doubt.' " U.S. Br. 6 (quoting *Jones*, 526 U.S. at 243 n.6). But the rule proposed by the United States in response is truly remarkable. The United States argues that there is *no* limit on the legislature's authority to remove fact-finding authority from the jury and place it in hands of sentencing judges. The United States admits that "[r]eliance on statutory sentencing factors to enhance a range [even above the maximum] does make a particular sentence turn on nonjury determinations," *id.* at 27, but it argues that this is not functionally different from a specific charge which nonetheless may result in a vast range of judge-imposed sentences under a very high maximum. *Id.* In either scheme, the United States notes, a judge or jury's finding of guilt " 'open[s] the door' to a long prison sentence." *Id.* (alteration in original).

The constitutionally pernicious aspect of this argument is that, as in this case, the proposed rule affords the prosecutor and the sentencing court an opportunity to alter fundamentally the nature of the charged crime – even *after* a trial or plea. Here, for example, the defendant was charged with a relatively innocuous crime (possession of a firearm for an unlawful purpose) and sentenced as a perpetrator of a hate crime against a local African-American family – an egregious violation of the community's well-being. Similarly, under a hypothetical homicide statute that conforms to the rule proposed by the United States, a guilty plea to a charge of simple manslaughter (causing the death of another) could be ratcheted up to first degree murder based upon the sentencing court's findings with respect to the accused's mental state. The functional difference between the rule proposed by the *Jones* Court and that of the United States is the simple and efficient expedient that, when the prosecution is held to the burden of pleading and proving beyond a reasonable doubt facts which increase the statutory maximum, the defendant knows in advance what his least favorable outcome could be *regardless* of what the prosecution chooses to assert at sentencing. Due process

and fundamental fairness require that a person be adjudged guilty and imprisoned for a term of years only on the strength of evidence that amounts to more than that which would suffice in a civil case. *In re Winship*, 397 U.S. 358, 363 (1970).

The United States acknowledges the Court's concern with permitting legislative bodies such broad discretion that they are able " 'to manipulate [their] way out of *Winship*'," U.S. Br. 24 (quoting *Jones*, 526 U.S. at 243), by "redefining the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." But that is precisely what its rule would do. It would allow the State to limit the jury's function and thereby to diminish the extent to which the jury interposes "between the State and the defendant, in order to protect against the conviction of innocent persons and to prevent arbitrary exercises of government power." *Id.* at 7. Moreover, a rule by which a state might convict an individual for one activity (possession of a weapon for an unlawful purpose) and sentence him for what might reasonably be perceived as a separate crime (a harmful act of hate against a minority group) does little to enhance the "respect and confidence of the community in applications of the criminal law." *Winship*, 397 U.S. at 364.[9] Nor does the United States adequately represent the interests of defendants in claiming that some defendants might benefit from the removal of potentially prejudicial issues from the purview of the jury. It is no secret and eminently reasonable that a defendant would prefer to have critical facts tried to a twelve-member jury, in a context where he bears no burden and is presumed

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[9] While there may be limitations on *individual* sentences based upon due process principles prohibiting the use of misinformation or Eighth Amendment concerns with disproportionate sentences, U.S. Br. 28-29, these principles would have no limiting effect on a State's ability to define crimes in ways which leave defining and traditional elements to sentencing courts alone.

innocent. Even assuming that United States is correct that some defendants might prefer otherwise, such defendants can opt for bifurcation, stipulation, or special interrogatories. Accordingly, the rule proposed by the United States fails to satisfy both the constitutional and prudential principles at issue.

CONCLUSION

For all these reasons, Petitioner respectfully requests that the decision of the New Jersey Supreme Court be reversed, the New Jersey hate crime law be declared unconstitutional, Petitioner's twelve-year term of imprisonment on Count 18 be overturned, and this case be remanded to the trial court for a jury trial on the issue of whether there is proof beyond a reasonable doubt that this defendant committed the crime charged "with purpose to intimidate" on account of race.

Respectfully submitted,

JEFFREY T. GREEN
TIMOTHY D. HAWKES
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

JOSEPH D. O'NEILL, ESQ.
Counsel of Record
CHARLES I. COANT, ESQ.
JOSEPH D. O'NEILL, P.A.
30 West Chestnut Avenue
P.O. Box 847
Vineland, New Jersey 08362
(856) 692-2400

RICHARD G. SINGER, ESQ.
217 North Fifth Street
Camden, New Jersey 08102
(856) 225-6181

Counsel for Petitioner

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No. 99-478

In the Supreme Court of the United States

CHARLES C. APPRENDI, JR., PETITIONER

v.

STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

SETH P. WAXMAN
Solicitor General
Counsel of Record
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
EDWARD C. DUMONT
Assistant to the Solicitor General
NINA GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

36pf

QUESTION PRESENTED

Whether a state statute may constitutionally increase the maximum authorized penalty for a crime on the basis of a finding made by the sentencing court, by a preponderance of the evidence, that in committing the crime the defendant acted "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

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In the Supreme Court of the United States

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STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a statutory sentencing factor may constitutionally increase the maximum authorized penalty for certain crimes based on proof to a judge, by the preponderance of the evidence, of the defendant's purpose to intimidate because of race. Because various federal criminal laws authorize the imposition of enhanced sentences on the basis of facts found by the court at sentencing, see, *e.g.*, 21 U.S.C. 841(b) (drug type and quantity), the United States has a strong interest in the outcome of this case.

STATEMENT

1. Early in the morning on December 22, 1994, petitioner fired eight rifle shots into the home of Michael and Mattie Fowlkes and their three children—the only black family living in his neighborhood in Vineland, New Jersey. Pet. App. 2a-3a, 101a-102a, 107a. The shots shattered the glass in the Fowlkes's front french doors and caused other damage. *Id.* at 107a-109a. It was the fourth time the Fowlkes home had been hit by

gunfire in the five months they had lived there. *Id.* at 2a-3a.

After the December 22 shooting, a neighbor recognized petitioner's truck driving away. Pet. App. 3a. When police officers arrested petitioner a short time later, he admitted that he had fired shots into the house. *Ibid.* Petitioner later told the police that although he did not know the residents of the house personally, he "d[id] not want them in the neighborhood" because they were black, and was "just giving them a message that they were in his neighborhood." *Id.* at 3a, 175a-180a. When officers executed a search warrant at petitioner's house they found a number of weapons, including a .22-caliber rifle with a laser sight and silencer and an anti-personnel bomb. *Id.* at 3a.

2. A state grand jury charged petitioner with a number of offenses, ranging from harassment to attempted murder. Pet. App. 3a; J.A. 2-12. Petitioner agreed to plead guilty to one count of possession of a destructive device, in violation of N.J. Stat. Ann. § 2C:39-3(a) (West 1995), and two counts of possession of a firearm for an unlawful purpose, in violation of N.J. Stat. Ann. § 2C:39-4(a) (West 1995). Pet. App. 3a. Under the latter provision, "[a]ny person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." N.J. Stat. Ann. § 2C:39-4(a) (West 1995). New Jersey's general sentencing statute specifies that "[e]xcept as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, * * * [i]n the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years." *Id.* § 2C:43-6(a).

Petitioner's plea agreement recited that the ordinary maximum sentence for each of the firearms counts was

ten years' imprisonment, but that the State reserved the right to seek a longer term on one count on the authority of N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999), which provides that a sentencing court

> shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime * * * to an extended term if it finds, by a preponderance of the evidence, [that] * * * [t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.

See Pet. App. 4a; Plea Agreement 1. Where Section 2C:44-3 authorizes the imposition of an "extended term," Section 2C:43-7 provides that the defendant shall be imprisoned "[i]n the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years." N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 1999). Petitioner, in turn, reserved the right to challenge the constitutionality of Section 2C:44-3(e). Pet. App. 4a.

Before accepting petitioner's plea, the state court assured itself that petitioner personally understood that even without an "extended" sentence, he faced a maximum prison term of 20 years, with no possibility of parole for the first 10 years (if his two firearms sentences were run consecutively); and that if his challenge to the "extended sentence" provision was rejected, he faced a maximum total sentence of 30 years' imprisonment, with no parole eligibility during the first 15 years. J.A. 19-24.

At a hearing held before sentencing, petitioner testified that he had been drinking and had taken medication on the night of the December shooting, and that he had fired at the Fowlkes's house after the glass and the

color of the door "caught [his] eye." Pet. App. 251a; see *id.* at 236a-239a. A defense psychologist also testified that petitioner had a history of psychological disorders. *Id.* at 4a-5a, 213a-219a. At sentencing, the court rejected these explanations, found that the December shooting was motivated by racial bias, and held that petitioner was subject to an "extended" sentence under Section 2C:44-3(e). Pet. App. 5a, 141a-145a. The court accordingly sentenced petitioner to 12 years' imprisonment on the count related to the December shooting, and to concurrent terms of seven and three years' imprisonment on the remaining charges. J.A. 45-46; Pet. App. 5a, 161a.

3. The Appellate Division of the New Jersey Superior Court affirmed petitioner's convictions and sentence, with one judge dissenting. Pet. App. 68a-94a. As relevant here, the court rejected petitioner's argument that the sentence imposed on him under Section 2C:44-3(e) violated the federal Constitution because it was based on the trial court's finding, by a preponderance of the evidence, of racial motivation, rather than on an admission obtained as part of his guilty plea or on a finding made by a jury beyond a reasonable doubt. Pet. App. 86a-94a. The court held that Section 2C:44-3(e) treats racial bias as a sentencing factor, not as an element of any offense, Pet. App. 87a, and that such treatment of a traditional sentencing factor, such as motive, is constitutional. *Id.* at 89a.

4. The Supreme Court of New Jersey affirmed. Pet. App. 1a-28a. The court agreed with the Appellate Division that a defendant's racial motivation did not become "an element of the weapons possession charge" by reason of Section 2C:44-3(e), and that the state legislature's reasons for "provid[ing] that the actor's biased purpose be treated as a sentencing factor" were "not constitutionally suspect." Pet. App. 25a. Applying this

Court's decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *McMillan* v. *Pennsylvania*, 477 U.S. 79, 89-90 (1986), the court concluded that Section 2C:44-3(e)

> simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the weight to be given that factor. A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis, is a very traditional sentencing factor.

Pet. App. 22a.[1] The court also observed that requiring juries to determine whether crimes were motivated by bias would "create[] an added risk of prejudice for defendants" by "open[ing] trials to evidence of former acts of bias" and "inject[ing] * * * issues of racial or ethnic bias that have a potential to inflame a jury." *Id.* at 24a.

Justices Stein and Handler dissented. Pet. App. 29a-66a. They reasoned that the finding of racial motivation required by Section 2C:44-3(e) "necessarily involves a finding so integral to the charged offense," and so significantly increases the range of authorized sentences, "that it must be characterized as an element" of the underlying offense with which the defendant is

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[1] The court acknowledged that this Court's later decision in *Jones* v. *United States*, 526 U.S. 227 (1999), had suggested that increasing the maximum statutory sentence on the basis of a sentencing factor could "pose 'grave and doubtful constitutional questions.'" Pet. App. 18a-19a (quoting *Jones*, 526 U.S. at 239). Noting, however, that "the language in *Jones* was not essential to its holding" and that this Court "did not expressly overrule the *Almendarez-Torres* formulation," the court determined that *Almendarez-Torres* continued to provide the proper framework for constitutional analysis. *Id.* at 19a-20a.

charged. Pet. App. 30a. They concluded, accordingly, that Section 2C:44-3(e) is unconstitutional because it permits the finding of racial motivation to be made by the sentencing court by a preponderance of the evidence. *Ibid.*

SUMMARY OF ARGUMENT

A. The definition of the elements of a criminal offense is essentially entrusted to the legislature. There is no constitutional requirement that all matters that mitigate or aggravate a particular offense must be made elements of a crime, to be proved to a jury beyond a reasonable doubt. Rather, having defined a crime, legislatures have a variety of options in structuring a system of sentencing. Legislatures may fix the penalty themselves; they may define broad ranges for sentencing courts; or they may constrain the discretion of sentencing courts within those ranges, either through binding sentencing guidelines or through other directives. They may also require judges to sentence based on the fullest possible information about the offense and offender, generally finding relevant facts by a preponderance of the evidence.

B. In light of those principles, the proposed constitutional rule suggested in *Jones* v. *United States*, 526 U.S. 227, 243 n.6 (1999)—that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt"—should be rejected. Such a rule would not be deeply rooted in this country's traditions. Rather, it would impinge on the recognized legislative prerogative to guide the administration of sentencing by designating the weight to be accorded to traditional sentencing factors. A legislature may prescribe determinate sentences, or set wide sentencing ranges with the understanding that

judges will exercise appropriate discretion. A sentence that is constitutionally permissible when selected by a court on the basis of whatever factors it deems appropriate does not become impermissible simply because the court is permitted to select that sentence only after making a finding prescribed by the legislature.

C. The rule proposed in *Jones* also conflicts with the rationale of three lines of this Court's precedent. The Court has upheld the legislature's designation of sentencing factors that mandate a *minimum* sentence within a pre-existing range; it has sustained the federal sentencing guidelines system, under which binding sentencing ranges, within statutory maximum and minimum terms, turn on judicial findings at sentencing, made under the preponderance-of-the-evidence standard; and it has endorsed capital punishment schemes in which aggravating factors, necessary to make a defendant eligible for a capital sentence, are found by the judge at sentencing, rather than by the jury at trial. If judicial findings can justify mandatory minimum terms, guidelines sentences within a range of punishment, and increases in a defendant's sentencing exposure from life to death, there is no reason to bar legislatures from specifying judicial findings that will operate to increase the maximum authorized term of imprisonment.

D. The rule proposed in *Jones* would serve no overriding constitutional purpose. The Constitution requires proof beyond a reasonable doubt, and the interposition of the jury between the State and the defendant, in order to protect against the conviction of innocent persons and to prevent arbitrary exercises of government power. Once a defendant is found guilty of a properly defined criminal offense, however, the State's interest validly shifts to the question of determining an appropriate punishment. In that inquiry, the

rigorous formality of criminal trials gives way to a practical and commonsense effort to select a sentence that fairly punishes the individual offender and protects the community. Sentencing enhancement factors fit logically into that framework. A legislature's provision for increased maximum terms of punishment based on judicial findings does not erode or depreciate the jury's function. There are significant constitutional limits on the sentencing process. Neither our constitutional tradition nor fundamental fairness, however, requires that all the protections of a criminal trial be afforded in determining the existence of factors that the legislature deems relevant only to sentencing.

ARGUMENT

A STATE MAY CONSTITUTIONALLY PROVIDE THAT BIASED PURPOSE IS A SENTENCING FACTOR THAT INCREASES THE OTHERWISE APPLICABLE SENTENCING RANGE FOR AN OFFENSE

The New Jersey legislature has defined the offense at issue in this case to be "possession [of] any firearm with a purpose to use it unlawfully against the person or property of another." N.J. Stat. Ann. § 2C:39-4(a) (West 1995). It has also determined that enhanced punishment for that offense should be available when the offense is committed with a racially biased purpose. *Id.* § 2C:44-3(e). Like other facts that are germane to the proper punishment of a defendant found guilty of a crime, but that are not made elements of the underlying crime, that enhancing circumstance is to be found by the court, at sentencing, by a preponderance of the evidence. The New Jersey Supreme Court has concluded that state law creates this division between guilt and sentencing determinations, and that conclusion is binding in this Court. See, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 483 (1993). The question here is whether

the State's decision complies with the federal Constitution.

"[T]he Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *Monge* v. *California*, 524 U.S. 721, 729 (1998) (citing *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998)). But in *Jones* v. *United States*, 526 U.S. 227, 239-252 (1999), the Court suggested that there is a serious unresolved question whether, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6. The Court should resolve that question by holding that there is no such requirement. Once a defendant has been found guilty of a crime, after being afforded his Fifth and Sixth Amendment rights, the Constitution does not prevent the State from entrusting to the sentencing process the determination of facts that may enhance the range of appropriate punishment.

A. A State Has A Wide Range Of Options For Structuring The Sentencing Process

The Court's cases have settled several basic propositions that properly frame the question presented here.

First, the Court has repeatedly made clear that, within broad constitutional limits, definition of the elements of criminal offenses is a matter for state legislatures or for Congress, not for the federal courts. *Staples* v. *United States*, 511 U.S. 600, 604 (1994) ("[T]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.");

McMillan v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("the state legislature's definition of the elements of the offense is usually dispositive"). In defining a criminal offense, the Constitution does not require the State to include as "elements" all matters of defense, *Martin* v. *Ohio*, 480 U.S. 228, 233 (1987), mitigation, *Patterson* v. *New York*, 432 U.S. 197, 201 (1977), or aggravation, *McMillan*, 477 U.S. at 84-91. Rather, the State has considerable latitude to define such matters as affirmative defenses or sentencing considerations.

Second, having defined a crime, the legislature may prescribe the punishment to be imposed on the offender. It may do so by itself prescribing a fixed penalty (other than capital punishment). See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punishments without giving the courts any sentencing discretion."). Or it may specify that the court must impose a sentence falling within a defined range, which may be either narrow or broad. See, *e.g.*, *Mistretta* v. *United States*, 488 U.S. 361, 364-365 (1989); *United States* v. *Grayson*, 438 U.S. 41, 45-48 (1978); compare, *e.g.*, 18 U.S.C. 1301 (authorizing imprisonment for not more than two years for importing lottery tickets) with 18 U.S.C. 1201(a) (making kidnapping punishable by "imprisonment for any term of years or for life").

Third, once a sentencing range has been set by statute, "the scope of judicial discretion with respect to a sentence is subject to [legislative] control." *Mistretta*, 488 U.S. at 364. The legislature may vest the sentencing court with essentially "unfettered discretion." *Ibid.* Or, at the other end of the spectrum, it may cabin the exercise of that discretion with legislatively adopted guidelines. See *Miller* v. *Florida*, 482 U.S. 423 (1987) (state indeterminate sentencing scheme subject to presumptive sentencing ranges under sentencing guide-

lines); compare N.J. Stat. Ann. § 2C:44-1 (West 1995) (establishing presumptions with respect to imposition and appropriate length of prison sentences for various types of crimes). It may specify considerations that a court must take into account at sentencing. See 18 U.S.C. 3553(a) (setting out seven factors to be considered in imposing sentence). It may set mandatory minimum sentences, within the range otherwise prescribed, that a court must impose if it finds the existence of specified facts or circumstances. See *McMillan*, *supra* (possession of a firearm during commission of the offense required mandatory minimum sentence). And it may require adherence to administratively promulgated sentencing guidelines that establish presumptive sentencing ranges. See, *e.g.*, *Mistretta*, *supra*; *Edwards* v. *United States*, 523 U.S. 511 (1998); *United States* v. *Watts*, 519 U.S. 148, 155-157 (1997) (per curiam). All of these approaches regulate sentencing, within the range otherwise prescribed by statute, on the basis of findings made by the court about the nature of the offense and the character of the offender.

Fourth, whether the sentencing court retains plenary discretion or is limited by mandatory minimums or a guidelines system, it is generally entitled, and by tradition expected, to receive and consider an essentially unlimited range of potentially relevant information, in order to make an individualized sentencing determination based on the particular circumstances of the case. See, *e.g.*, 18 U.S.C. 3661; *Witte* v. *United States*, 515 U.S. 389, 397-398 (1995); *Nichols* v. *United States*, 511 U.S. 738, 747 (1994); *Williams* v. *New York*, 337 U.S. 241, 246 (1949). In conducting that inquiry, "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 U.S. at 91. This Court has repeatedly approved the finding of sentencing facts by a pre-

ponderance of the evidence. *Id.* at 91-93; *Watts*, 519 U.S. at 155-157.[2]

B. The Specification Of Sentencing Factors That Increase The Authorized Sentence Is Consistent With Constitutional Principles And Practice

Against this background, the proposed rule articulated in *Jones*—that "any fact (other than prior conviction) that increases the maximum penalty for a crime" must be treated as an element of the crime (526 U.S. at 243 n.6)—is unwarranted. Such a rule would prohibit the entire class of legislation that specifies statutory "sentencing factors" (other than recidivism) that may enhance the range of punishment beyond an otherwise applicable range, unless those factors are designated as offense elements that must be proved to a jury beyond a reasonable doubt. The defendant does have the right to have a jury determine guilt of a criminal offense beyond a reasonable doubt. *Sullivan* v. *Louisiana*, 508 U.S. 275, 277-278 (1993). But such a rule has never been applied at sentencing. Nor would application of such a rule find support in "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson*, 432 U.S. at 202.

1. The proposed rule in *Jones* could be understood to require only that a legislature make clear, in defining a crime, that the "maximum penalty" is the highest that will be authorized for that crime under any circumstances. As applied to the carjacking statute at issue in *Jones*, for example, the proposed rule would have been satisfied if Congress had provided: "Carjacking, as defined in 18 U.S.C. 2119, is punishable by up to life imprisonment; provided that the court may not impose a sentence in excess of 15 years' imprisonment unless it finds that serious bodily injury resulted from the carjacking." If that formulation were sufficient to satisfy the Court's proposed constitutional test, the test would turn on formalities of legislative drafting. See 526 U.S. at 267 (Kennedy, J., dissenting). We therefore assume, for present purposes, that the *Jones* Court intended to suggest a substantially broader constitutional rule. See *Monge*, 524 U.S. at 741 (Scalia, J., dissenting) (advocating similar rule that would apply "[h]owever [a State] chooses to divide and label its criminal code").

That broader rule, however, would impinge on the prerogative of legislatures to guide the administration of their criminal justice systems, without affording any offsetting benefit in the form of protection of constitutional values. Criminal laws and their accompanying sentencing provisions, taken as a whole, reflect a variety of interrelated legislative judgments, based on policy choices relating to both crime and punishment. In defining criminal conduct, the legislature identifies those acts that are sufficiently harmful or invasive of the rights of society as to merit application of the social stigma of a criminal conviction and the deprivation of liberty that may be imposed as a punishment. Anyone who is found, after a trial conducted in accordance with constitutional protections, to have committed the proscribed acts may be convicted and branded as a criminal.

Within that class of offenders, the legislature may also identify certain characteristics of the crime and the

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[2] The Court has also noted the existence of a divergence of opinion among the courts of appeals on whether a higher standard might be required, in "extreme" circumstances, in making findings under the federal Sentencing Guidelines. *Watts*, 519 U.S. at 156 & n.2; *Almendarez-Torres*, 523 U.S. at 247-248. That question is presented by the government's pending petition for a writ of certiorari in *United States* v. *Reed*, No. 99-1096 (filed Dec. 29, 1999).

offender that make the defendant more or less culpable than other individuals who have engaged in the same criminal conduct. The legislature may legitimately determine that those factors, though not essential to criminality, are highly germane to the precise punishment to be meted out in the particular case. Here, for example, New Jersey has defined the offense in question as possession of a firearm for the purpose of using it unlawfully against the person or property of another. The State has also made clear that a particular offender is worthy of more serious punishment when his *motive* for committing that offense is racial bias. Bad motive is a traditional sentencing factor, *i.e.*, a factor that makes an offender who has committed a particular crime worthy of more serious punishment, and it may be taken into account in sentencing for a particular offense. *Wisconsin* v. *Mitchell*, 508 U.S. at 485; see *Barclay* v. *Florida*, 463 U.S. 939 (1983) (per curiam).

By explicitly designating motive as a sentencing factor that enhances the otherwise-applicable punishment, the New Jersey legislature has expressed a particular judgment about how severely offenders of a particular class should be punished. There is nothing suspect in that determination. Once the presumption of innocence has been overcome by the jury's finding of guilt, see *Taylor* v. *Kentucky*, 436 U.S. 478, 483-486 (1978), the legislature's interest shifts from defining prohibited conduct to ensuring that society obtains a fair and adequate sentence, calibrated to the nature of the offender and the details of the particular offense. The procedures of sentencing, which courts generally conduct with a view towards assembling the most complete picture possible of the offense and the offender, are far better suited to the determination of an accurate punishment than are the formal procedures and evidentiary constraints of a criminal trial.

By the same token, deferring exploration of some of the details of the offense—why it was committed, and in what precise manner—until sentencing may serve compelling interests of fairness and practicality. The legislature may conclude, for example, that in a jury trial the government should not be required to prove, or an accused to defend against, formal allegations of "bias," when those allegations are important to punishment but not central to the crime itself. See Pet. App. 24a (requiring proof of racial bias at trial could "create[] an added risk of prejudice for defendants" and "inject into the trial of cases issues of racial or ethnic bias that have a potential to inflame a jury"). The legislature may also conclude that a jury trial should not be unduly prolonged or complicated by a requirement that every detail of the defendant's offense be determined with precision and documented by a special verdict.

Legislatures have made judgments of that character in framing any number of criminal offenses and related sentencing schemes. The primary federal drug statute, for example, 21 U.S.C. 841 (1994 & Supp. IV 1998), defines, in subsection (a), an offense of knowingly or intentionally manufacturing, distributing, or dispensing any controlled substance. It then sets out, in subsection (b), a set of statutory sentencing factors relating primarily to the type and quantity of drugs involved in a given offense, as well as to the defendant's criminal history and whether the particular crime resulted in special harm, such as bodily injury or death. The sentence varies considerably based on the circumstances of the crime. Those circumstances, however, are not encompassed in the determination of guilt. See *Mitchell* v. *United States*, 119 S. Ct. 1307, 1314 (1999) (after a valid plea of guilty under federal drug statutes, "[p]etitioner faced imprisonment from one year upwards to life, depending on the circumstances of the crime").

Like the state law at issue here, Section 841 reflects a legislative judgment that certain elements are necessary to constitute a criminal "offense," without proof of which no punishment is warranted, while other factors are highly relevant to setting an appropriate sentence. Congress's very separation of those factors, such as type and quantity of particular drugs, into separate sentencing provisions demonstrates a judgment that they are not essential to the finding of criminality. It also furthers legitimate aims of practicality and fairness. There is no reason to require protracted proceedings before the jury to make detailed factual determinations that are important to sentencing, but collateral to guilt. And "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Monge*, 524 U.S. at 729.[3] The legislative judgments reflected in statutes that differentiate between elements and sentencing factors are thus legitimate and important, and should not be lightly set aside.

2. There is, moreover, no evident reason to hold that statutes embodying such judgments are constitutionally different from statutes that define an offense and then specify only the maximum penalty that the

[3] It has been suggested that courts could deal with any risk of unfairness by "bifurcating" trials into "guilt" and "appropriate sentence" phases. See *Monge*, 524 U.S. at 739 n.1 (Scalia, J., dissenting). Routine bifurcation of non-capital trials, however, would be an extraordinarily cumbersome way to conduct the criminal process. In a complex multi-defendant drug conspiracy case, sentencing proceedings in which a jury would be asked to allocate to each co-conspirator particular types and quantities of drugs would not only be burdensome, they would risk jury confusion that would ill serve society's interest in determining a fair punishment for each individual defendant.

legislature believes appropriate for the worst offenses and offenders, while allowing judges plenary discretion within that range. When a legislature sets forth a broad range of possible punishment, it does not necessarily expect that judges will impose sentences at or near the maximum term of imprisonment in ordinary cases. Rather, the legislature can reasonably assume that sentencing judges will take into account typical factors bearing on the crime and offender, selecting harsher sentences for those offenders whose conduct and character are marked by greater social evil, and milder sentences for others.[4] If a particular judge openly declared that he or she imposed longer sentences only when offenders committed their crimes under particularly egregious circumstances, such as

[4] Occasionally, that assumption is made explicit in a statute. See 27 U.S.C. 91 (Supp. III 1929) (setting penalty range for illicit transactions in liquor, "*Provided*, That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law."). See *Husty* v. *United States*, 282 U.S. 694, 702-703 (1931). More commonly, "[s]entencing and parole release decisions * * * have largely been left to the unfettered discretion of the officials involved. Legislatures have traditionally set high maximum penalties within which judges must choose specific sentences, but generally have provided little guidance for the exercise of this choice. * * * In effect, sentencing policymaking has traditionally been delegated to a multitude of independent judges to be exercised in the context of individual cases. There has been no attempt to separate policymaking from individual sentencing determinations. * * * [W]hich factors should be considered, under what circumstances, and how they are to be weighted are decisions left solely to the unfettered discretion of the individual decisionmakers." *Bullington* v. *Missouri*, 451 U.S. 430, 443 n.16 (1981) (quoting Hoffman & Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89, 96 (1978) (footnotes omitted)).

because of racial hatred, it would not change the underlying criminal offense by adding an element of "racial bias." Rather, it would embody the sort of reasoned judgment that legislatures ordinarily expect sentencing courts to make.

The result should not be different where, to mirror or standardize existing practice, the legislature imposes explicit statutory constraints on the discretion otherwise accorded sentencing courts. See *Witte*, 515 U.S. at 401-402; *McMillan*, 477 U.S. at 92 ("We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance."). The specification of a sentencing enhancement does not alter the inherent nature of the underlying crime, regardless of whether the factor is identified in a sentencing proceeding by a judge or in a statute by the legislature. And it is difficult to see why a sentence that is constitutionally permissible if selected by a judge exercising unlimited discretion becomes constitutionally impermissible because the judge was permitted to select it only after making a statutorily specified threshold finding.

We agree with the observation that this Court's constitutional analysis should not turn on mere formalities in the way a legislature frames or organizes its criminal statutes. See, *e.g.*, *Jones*, 526 U.S. at 267 (Kennedy, J. dissenting); *Monge*, 524 U.S. at 741 (Scalia, J., dissenting). Constitutional rights should not be controlled by labels. For essentially that reason, however, it should not matter whether a legislature has provided a high overall statutory maximum, with the expectation that implicit "sentencing factors" will determine where in the range the judge will fix the punishment, or has itself provided graduated penalties for an offense that escalate incrementally depending on specified findings

made at sentencing. Indeed, the most significant difference between the two schemes is a feature of the former that works *against* the defendant: in a system of pure discretion, the sentencing judge always has the power to impose the greatest sentence available, even if the legislature intended that maximum term to be reserved for the worst offenders. It is not reasonable to hold that the Constitution requires legislatures to expose all offenders to the same maximum penalty, to be imposed or not at the discretion of the sentencing judge, rather than specifying for the judge *which* classes of offenders who commit a particular crime may receive the harshest treatment.

C. A Rule Requiring Jury Determination, Beyond A Reasonable Doubt, Of All Sentencing Factors That Raise The Maximum Authorized Term Does Not Accord With This Court's Cases

The rule proposed in *Jones* would also be at odds with the logic underlying this Court's previous holdings in closely related areas.

1. In *McMillan* v. *Pennsylvania*, this Court held that statutes may prescribe mandatory *minimum* sentences to be imposed on the basis of findings made by a judge at sentencing. There is a fundamental parallel between the judgment exercised by a legislature in prescribing a minimum sentence that *must* be imposed *if* the judge makes a specified finding, and the judgment exercised by a legislature in prescribing one or more upper ranges of sentences that *may not* be imposed *unless* the judge makes such a finding. In each case, the legislature identifies a particular factor and specifies sentencing consequences that flow from its existence. If a legislature may require a mandatory minimum sentence based on a fact proved at sentencing, it should also be entitled to preclude sentences in excess of a

particular length absent proof of a fact at sentencing. To hold otherwise would allow legislatures to constrain judicial sentencing discretion to the invariable *detriment* of criminal defendants, while forbidding them from constraining it in a manner that may *benefit* some defendants. That would be an odd manner of protecting the constitutional rights of the accused.

In *Almendarez-Torres*, the Court correctly observed that mandatory minimum sentences are generally more onerous in their effect on criminal defendants than are provisions that raise the maximum sentence available based on a particular finding at sentencing. 523 U.S. at 244-245. The Court relied on that observation and other factors in holding that increasing the maximum term based on the sentencing factor of recidivism does not violate the Constitution. *Id.* at 239-247.[5] Adoption of the *Jones* rule for all other types of sentencing factors than recidivism, however, could lead legislatures to eliminate intermediate sentencing ranges—which benefit some defendants—from their criminal statutes, contenting themselves instead with simple offense definitions, wide sentencing ranges, mandatory minimums,

[5] In *Jones*, the Court suggested that the factor of recidivism could be distinguished from all other sentencing factors because "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. at 249. That distinction overlooks that the defendant on trial may dispute that the prior conviction is *his*. When identity is controverted, the vital factual question is whether the defendant *is*, in fact, a recidivist and thus subject to enhanced punishment. That finding, like all other determinations relevant to sentencing, will be made by a judge under the preponderance standard. It is true that disputes over the identity of a felon will seldom be difficult to resolve, but the proposed constitutional rule in *Jones* presumably does not turn on the ease or difficulty of proving a particular factor. Many sentencing factors may be present beyond rational dispute in a given case.

and the discretion of sentencing judges. See, *e.g.*, 18 U.S.C. 924(c) (Supp. IV 1998) (replacing former provisions that specified graduated determinate sentences based on various criteria with new provisions in which the same criteria define mandatory *minimum* sentences, with a maximum of life imprisonment for *any* version of the offense). Alternatively, a State might elect to set the greatest maximum penalty for all persons who commit a particular offense, while providing for affirmative defenses (or mitigating factors) to be proved by the defendant in order to obtain a lesser penalty. Cf. *Patterson* v. *New York*, *supra* (State may provide for an affirmative defense of extreme emotional disturbance that mitigates murder to manslaughter to be proved by the preponderance of the evidence).[6] It is doubtful that such regimes would benefit criminal defendants as a class, or advance the goals of rational and reasonably uniform sentencing.

2. As noted above, the Court has upheld the use and operation of the federal Sentencing Guidelines. *Mistretta* v. *United States*, 488 U.S. 361 (1989). Cases under the Guidelines make clear that so long as the minimum and maximum sentences prescribed by statute are observed, it is constitutionally permissible for the Guidelines to guide and channel the discretion exercised by sentencing courts—and to do so on the basis of factual findings made by the sentencing judge by a

[6] Under *Patterson*, New Jersey could have provided for a 20-year sentence for all firearms offenses, subject to an affirmative defense that lowered the maximum term to ten years where the use of the firearm was not motived by racial bias, did not result in bodily injury, was not stolen, did not function automatically, and so forth. A State that adopted such a regime of affirmative defenses could put the burden of persuasion on the defendant, in contrast to New Jersey's current requirement that the State bear the burden of proof.

preponderance of the evidence. See, *e.g.*, *Edwards*, 523 U.S. at 513-514; *Watts*, 519 U.S. at 155-156; *Witte*, 515 U.S. at 400-404; see also note 2, *supra*. The sentencing ranges set by the Guidelines operate as legal constraints on the sentencing court. See *Stinson* v. *United States*, 508 U.S. 36, 42 (1993). The judge is ordinarily limited to the maximum term set by the applicable Guidelines range, unless the range exceeds the statutory maximum term or there are grounds to depart upward. See *Koon* v. *United States*, 518 U.S. 81, 92-93 (1996); *United States* v. *R.L.C.*, 503 U.S. 291, 306-307 (1992).

The Constitution thus permits legislatures to set determinate sentences; to set only broad sentencing ranges, leaving all subsidiary determinations to the unguided discretion of the sentencing judge; or to set overall maximum and minimum sentences, and then require judges to abide by intermediate sentencing ranges established by a sentencing commission (subject to departures in extraordinary cases). The *Jones* rule, however, would essentially forbid the legislature from mandating sentencing ranges within an overall maximum term, with no departures from those ranges allowed, unless the court treated each fact that made a defendant eligible for a higher range as if it were an element of an aggravated offense. The constitutional principle that would require those distinctions is elusive at best.

3. Finally, as *Jones* acknowledges, 526 U.S. at 251, the proposed rule is in at least considerable tension with the Court's consistent holdings in capital cases that the aggravating factors necessary to impose a death sentence need not be made "elements" of the capital offenses in question, and may be found by sentencing judges (or even by an appellate court). See, *e.g.*, *Walton* v. *Arizona*, 497 U.S. 639, 645, 647-649

(1990); *Hildwin* v. *Florida*, 490 U.S. 638 (1989) (per curiam); *Cabana* v. *Bullock*, 474 U.S. 376, 385-386 & n.3 (1986) ("while the Eighth Amendment prohibits the execution of * * * defendants [in the absence of predicate findings], it does not supply a new element of the crime of capital murder that must be found by the jury"; rather, it places "a substantive limitation on sentencing" that "need not be enforced by the jury."); *Spaziano* v. *Florida*, 468 U.S. 447, 452 (1984).[7]

Such findings are not simply factors that guide the "choice between a greater and a lesser penalty." *Jones*, 526 U.S. at 251. They are mandatory matters necessary to increase the sentencing range from life to death.[8]

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[7] The Court reaffirmed that principle in *Hopkins* v. *Reeves*, 524 U.S. 88, 100 (1998), with respect to the intent findings required for a capital sentence. The Court explained that the Eighth Amendment rule requiring a "culpable mental state" for a capital sentence "does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury . . . and does not affect the state's definition of any substantive offense." *Id.* at 100 (quoting *Cabana*, 474 U.S. at 385). A State may therefore comply with the mental-state requirement "at sentencing or even on appeal." 524 U.S. at 100.

[8] See *Lowenfield* v. *Phelps*, 484 U.S. 231, 244-246 (1988). *Jones* based its analysis (526 U.S. at 251) on language in *Walton*, 497 U.S. at 648, which stated: "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Walton*, however, does not support the analysis in *Jones*. *Walton* quoted *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986), which in turn quoted the phrase "standards to guide the making of [the] choice" from *Bullington* v. *Missouri*, 451 U.S. 430, 438 (1981). Both *Poland* and *Bullington* make clear that the finding of at least one aggravating circumstances is a prerequisite to a capital sentence. See *Poland*, 476 U.S. at 156 (in Arizona "the sentencer must find some aggravating circumstances before the death penalty may be imposed'); *Bullington*, 451 U.S. at 439, 441 n.15 (noting that the jury was required, after finding guilt, to find

See *Jones* v. *United States*, 119 S. Ct. 2090, 2097-2098 (1999) (describing the intent and aggravating factors in the Federal Death Penalty Act, 18 U.S.C. 3591 *et seq.*, that made the defendant "death-eligible," and distinguishing those prerequisites from the process of "weighing" aggravating and mitigating factors in the "selection decision" between life and death). Judges, rather than juries, may therefore make findings that are legislatively and constitutionally essential before a defendant may be sentenced to death. It would be a strange constitutional regime that permitted that process, yet precluded a legislature from specifying a statutory enhancement factor that raised the sentencing range available to a judge in imposing a term of imprisonment.

D. There Is No Justification For Adopting The Constitutional Rule Proposed In *Jones*

All of these considerations might be overborne if there were a compelling reason for adopting the rule suggested in *Jones*. No showing has been made, however, of any danger to liberty that would justify it.

1. The constitutional concerns voiced in *Jones* relate to the due process requirement of proof beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 364 (1970), and the Sixth Amendment right to trial by jury. See 526 U.S. at 242. With respect to due process, the Court noted a concern that unlimited legislative control over sentencing factors that raise the maximum term could permit a State "to manipulate its way out of *Winship*," *id.* at 243, by permitting guilt to be found on

"additional facts in order to justify the particular sentence," and distinguishing *Stroud* v. *United States*, 251 U.S. 15 (1919), on the ground that "Stroud's jury was not required to find any facts in addition to those necessary for a conviction for first-degree murder in order to sentence him to death.").

less than proof beyond a reasonable doubt. See *id.* at 240-241 (characterizing *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), as resting in part on this view). The *Jones* Court also observed that *Patterson* v. *New York*, 432 U.S. 197, 210 (1977), while rejecting a *Winship* challenge, had nonetheless recognized that there is a constitutional "limit on state authority to reallocate traditional burdens of proof." 526 U.S. at 243. Neither the cited cases nor their underlying principles, however, support a constitutional rule as broadly defined as the one advanced in *Jones*.

In *Mullaney* v. *Wilbur*, the Court held only that a State that defines a particular fact as an element of an offense may not then dispense with proving that element to the jury by relying wholly on a presumption arising from proof of other facts. In *Patterson*, where the Court upheld the treatment of extreme emotional disturbance as an "affirmative defense" that reduced murder to manslaughter, the Court took pains to indicate that the reach of *Mullaney* went no farther than its ban on conclusive presumptions. *Patterson* declined to "disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." 432 U.S. at 210. The Court then observed that "there are obviously constitutional limits beyond which the States may not go." *Ibid.* But the limits that the Court had in mind involved abrogation of the presumption of innocence.[9]

[9] Immediately after its reference to "constitutional limits," *Patterson* stated: "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. The legislature cannot validly command that the finding of an indictment, or mere proof of the identity of the accused, should

See *McMillan*, 477 U.S. at 86-87 (*Patterson*, in responding to the concern that its holding would enable a State to have "unbridled power to redefine crimes to the detriment of criminal defendants," reaffirmed "the unremarkable proposition that the Due Process Clause precludes States from discarding the presumption of innocence.").

The presumption of innocence has not been discarded in this case. "Once the defendant has been convicted fairly in the guilt phase of the trial, the presumption of innocence disappears." *Delo* v. *Lashley*, 507 U.S. 272, 278 (1993) (per curiam). Petitioner was found guilty based on his plea acknowledging commission of the elements of the offense; had he not so pleaded, he would have been exposed to sentencing (including any enhancement for biased motive) only if he were found guilty beyond a reasonable doubt of the charged offense. "Once the reasonable doubt standard has been applied to obtain a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him." *McMillan*, 477 U.S. at 92 n.8.

2. With respect to the defendant's right to a jury trial, *Jones* expressed concern about the "practical implications" of allowing legislatures to enact statutory enhancement factors. 526 U.S. at 243. Noting that enhancement factors may significantly increase the

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create a presumption of the existence of all the facts essential to guilt." 432 U.S. at 210 (citations omitted). The Court has adhered to the principle that a State may not erect a conclusive presumption that a particular element of a crime may be presumed from proof of another element. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Carella* v. *California*, 491 U.S. 263, 265 (1989) (per curiam). That principle, however, is not implicated by a State's explicit determination that a particular fact, though germane to sentencing, is not relevant to guilt at all.

range of available punishment, the Court raised the question "whether recognizing an unlimited legislative power to authorize determinations setting ultimate sentencing limits without a jury would invite erosion of the jury's function to a point against which a line must necessarily be drawn." *Id.* at 244. Reliance on statutory sentencing factors to enhance a range does make a particular sentence turn on nonjury determinations. But that does not distinguish such a case from any other in which a range of sentences is authorized. Neither approach impairs the defendant's right to a jury trial. A defendant who pleads not guilty, and who exercises his right to a jury trial, may not be sentenced unless he is found guilty by a jury. While additional facts proved at sentencing may enhance his punishment, "there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." *McMillan*, 477 U.S. at 93.

The situation of a defendant exposed to an enhanced maximum sentence based on a statutory sentencing factor is functionally identical to the situation of a defendant exposed to a particular sentence based on factors that a court must find, under binding sentencing guidelines, within the same overall statutory range. The situation also resembles a scheme involving the same overall range and traditional discretionary sentencing carried out by the judge alone. The jury's finding of guilt in all of these regimes "open[s] the door" to a long prison sentence, up to and including life imprisonment, based on facts found at sentencing; but the jury finding that authorizes such sentencing cannot be described in any of them as "low-level gatekeeping." *Jones*, 526 U.S. at 244.

Nothing in this analysis detracts from the historical and contemporary importance of the right to trial by jury. That history, however, does not directly illumi-

nate the present issue, as the *Jones* Court acknowledged. 526 U.S. at 244. Rather, the significant historical lesson is found in the long-accepted and fundamental divide in our criminal justice system between the adjudication of guilt and the fixing of an appropriate punishment. The rigorous safeguards that the Constitution provides for the determination of guilt serve to protect the innocent, even at the expense of sometimes freeing the guilty, and to prevent arbitrary exercises of power by government. See *Winship*, 397 U.S. at 372 (Harlan, J., concurring) (discussing the reasonable-doubt principle); *Douglas* v. *Louisiana*, 391 U.S. 145, 151-154 (1968) (discussing purpose of the jury guarantee). Those same protections do not, however, apply at sentencing.

That is not because sentencing is not a serious matter. Rather, it is because sentencing implicates society's compelling interest in fashioning an appropriate punishment for the guilty that is consistent with the protection of the community. The government has complied with the core procedures required to attach social stigma to the defendant's acts and to deprive him of liberty; the question then becomes one of the *degree* of that deprivation. In making that determination, there is no longer the risk of punishing an innocent person, and the paramount consideration becomes society's interest in making the sentencing decision based on full and complete information, as assessed by a judge with whatever guidance the legislature chooses to provide.

The sentencing process does not take place in a constitutional vacuum. The Due Process Clause protects a defendant against being sentenced based on "misinformation of a constitutional magnitude." *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Townsend* v. *Burke*, 334 U.S. 736, 740-743 (1948). The Fifth Amendment protects against drawing an adverse inference about

the facts of an offense based on a defendant's silence at sentencing. *Mitchell* v. *United States*, 119 S. Ct. 1307, 1316 (1990). The First Amendment protects against imposing sentence based on a defendant's "abstract beliefs." *Dawson* v. *Delaware*, 503 U.S. 159, 167 (1992). And the Eighth Amendment provides a proportionality check that serves to prevent the imposition of a sentence grossly disproportionate to the offender's crime. *Harmelin* v. *Michigan*, 501 U.S. 957 (1991) (plurality opinion); cf. *United States* v. *Bajakajian*, 524 U.S. 321 (1998) (excessive fines).

In light of that background, a legislature's decision to specify factors that will raise the authorized level of punishment in some cases, as compared to others, does not risk eroding constitutional rights to a point "against which a line must necessarily be drawn." 526 U.S. at 244. Rather, it provides a mechanism for society to obtain a fair and proper punishment for an individual found guilty of crime. As the Court has reiterated in the context of Double Jeopardy challenges to applications of the federal Sentencing Guidelines, a defendant is properly punished only for an offense of which he has been convicted—no matter what other conduct or character factors may be taken into account in setting a sentence within the range authorized for that offense. See *Watts*, *supra*; *Witte*, *supra*; see also, *e.g.*, *Williams* v. *New York*, 337 U.S. 241 (1949). There are limits to the State's authority to define conduct as criminal in the first place. See *Robinson* v. *California*, 370 U.S. 660 (1962). Those limits include the requirement that citizens must have fair notice that specified conduct is against the law. See, *e.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). And, although a State need not conform its definition of crimes to the common law, there may also be limits on a State's power radically to redefine certain crimes. See *Jones*, 526 U.S. at 240-

241 (suggesting that State may "lack[] the discretion to omit 'traditional' elements from the definition of crimes"); cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 246 (1998) (noting that provisions at issue did not "change a pre-existing definition of a well-established crime"); *McMillan*, 477 U.S. at 90 (similar).

If, however, a defendant has been properly charged with a valid offense defined by the legislature, and has pleaded guilty to that offense or been found guilty by a jury, the Constitution permits the sentencing court to take account of any relevant information it has available concerning the defendant's conduct or character, and to impose any sentence authorized by law. It also permits a legislature to guide and limit the judge's sentencing discretion by specifying a fixed sentence, or through mandatory guidelines. It should make no constitutional difference if a statute instead specifies facts that, if found by the sentencing court, will increase the maximum authorized sentence.

CONCLUSION

The judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
EDWARD C. DUMONT
Assistant to the Solicitor General
NINA GOODMAN
Attorney

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In The
SUPREME COURT OF THE UNITED STATES

CHARLES APPRENDI, JR.,
Petitioner,

v.

THE STATE OF NEW JERSEY,
Respondents.

On Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia
22901
(804) 978-3888

January 13, 2000

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QUESTION PRESENTED FOR REVIEW

1. Whether this Court should decline the invitation of the New Jersey Supreme Court to decide whether New Jersey's hate crime law, N.J.S.A. 2C:44-3e, unconstitutionally provides for an extended term of imprisonment increasing the maximum possible penalty by ten years, based on proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt, and denies the defendant rights to notice by indictment and trial by jury.

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No. 99-0478

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BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

I. STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989) and *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over three dozen *amicus curiae* briefs in the United States Supreme Court, including recent criminal justice cases *Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 119 S.Ct. 1025 (cert. granted), Sup.Ct. No. 98–6322 (October Term 1998), and *Illinois v. Wardlow*, 119 S.Ct. 1573 (cert. granted), Sup. Ct. No. 98-1036 (January 12, 2000), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle several hundred cases nationally, including numerous fourth Amendment cases. The Institute has published educational materials and taught continuing legal education classes in this area as well.

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1 *Amicus curiae* The Rutherford Institute files this brief with the consent of counsel for both parties. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, is supporters, or is counsel, made a monetary contribution to the preparation or submission of this brief.

II. SUMMARY OF ARGUMENT

The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, fails to comport with federal due process requirements pursuant to the Fifth and Sixth Amendments. The statute allows the state's criminal courts to substantially enhance, and in many cases to double, the applicable term of imprisonment imposed upon a defendant upon a finding by a preponderance of the evidence that the defendant possessed the requisite *mens rea*. Further, the statute deprives defendants of the basic due process safeguards of a jury of their peers and proof of the discriminatory motive beyond a reasonable doubt, despite that the criminal intent the statute seeks to redress is (quite appropriately) the subject of the severest societal stigma and disapprobation. Accordingly, the Supreme Court of New Jersey should be reversed, and the case remanded for a retrial consistent with the Petitioner's constitutional protections.

III. ARGUMENT

Petitioner's appeal invites the Court to address constitutional due process issues left unresolved in the Court's recent decisions in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 526 U.S. 227 (1999). Unlike the questions addressed in *Almendarez-Torres* and *Jones*, which related to statutory construction of federal penal statutes, Petitioner's case involves a state criminal statute that has been interpreted by the highest court of that state and found to be consistent with the mandates of federal constitutional due process. Thus, the Court is confronted with a clear and urgent constitutional issue, presented in the equally important context of increasing state criminalization of "hate crimes": Whether a penal statute that permits a court to effectively double the maximum penalty upon conviction of a

crime upon proof by a preponderance of the evidence that the defendant possessed discriminatory intent, without benefit of notice in the charging instrument or trial by jury, offends the Fifth and Sixth Amendments of the United States Constitution. *Amicus* The Rutherford Institute respectfully submits that in the particular context of state "hate crime" legislation, which depends upon a demonstration of a discriminatory motive on the part of the defendant to establish the requisite *mens rea* for the penalty enhancement, due process mandates that such a determination be made by a jury of the defendant's peers, subject to the "reasonable doubt" standard of proof.[2]

1. The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, Contravenes Federal Constitutional

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[2] The Court's *amicus* notes that the question presented in this case does not address the constitutionality of state "hate crime" statutes under the Fifth and Sixth Amendments *per se*. While the Court declined to find such statutes unconstitutional under the First Amendment to the United States Constitution in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), that decision did not address *prima facie* challenges to hate crimes statutes arising under the due process provisions of the Constitution. The position of the Court's *amicus* expressed herein should not be construed to express an opinion on this issue, which it believes remains an open question. *Cf. Crimes Motivated by Hatred: The Constitutionality and Impact of Hate Crime Legislation in the United States*, 1 Syracuse J. of Leg. & Pol. 29 (1995);Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong*, 40 Boston Coll. Law Rev. 739 (May 1999); "Are Hate Crime Laws Necessary?" New York L.J., November 1, 1999, p.1; *What if Wisconsin v. Mitchell Had Involved Martin Luther King, Jr.? The Constitutional Flaws of Hate Crime Enhancement Statutes*, 65 Geo.Wash.Law Rev. 1014 (1997).

Due Process Under the Fifth and Sixth Amendments by Permitting Courts to Effectively Double Applicable Terms of Imprisonment Upon a Finding that the Defendant "More Likely than Not" Possessed the Requisite Discriminatory *Mens Rea*.

The New Jersey Hate Crime Law at issue herein, N.J.S.A. § 2C:44-3, is similar in structure and intent to the hate crime statute reviewed by the Supreme Court in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). *See id.* at 508 U.S. at 482, n.4. On its face, it is a mandatory penalty enhancement statute, providing that a court "shall," upon application of the prosecutor, sentence a person who has been convicted of a crime to an extended term of imprisonment if it finds by a preponderance of the evidence that "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." N.J.S.A. § 2C:44-3e.

It is a virtual truism that "the primary responsibility for fixing criminal penalties lies with the legislature." *Wisconsin v. Mitchell*, 508 U.S. at 486. On the other hand, the Court has made it equally clear in *In re Winship*, 397 U.S. 358 (1970) and subsequent cases that a legislature may not define criminal statutory elements and penalty enhancements in its own absolute discretion, and that *Winship* mandates inquiry into "substance rather than ... formalism" in determining whether the statute comports with due process. *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). "The rationale of [*Winship*] requires an analysis that looks to the 'operation and effect of the law as applied and enforced by the State ... and to the interests of both the State and the defendant as affected by the allocation of the burden of

proof," the Court has cautioned. *Id.*, quoting *St. Louis S.W.R. Co. v. Arkansas*, 235 U.S. 350, 362 (1914). Consequently, the Court's task herein is to assess whether New Jersey has "undermine[d] ... the interests that [*Winship*] sought to protect" by "redefin[ing] the elements that constitute different crimes," *Mullaney*, 421 U.S. at 698, in order to characterize as an aggravating factor a *mens rea* requirement that is actually an element of the crime subject to notice via complaint or indictment, *Patterson v. New York*, 432 U.S. 197, 210 (1977), and the right to a jury trial. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Almendarez-Torres, supra*; *Hamling v. United States*, 418 U.S. 87, 117 (1974).

Where the standard of the state's proof is a "preponderance of the evidence," the defendant has essentially the same burden of proof as the state does: whether it is "more likely than not," or in the case of the defendant's burden, less likely than not, that he possessed discriminatory intent. The determination that the defendant committed a reprehensible "hate crime" is thus almost equibly poised between establishing hate and absolving the defendant of animus. The Supreme Court has found sentencing schemes violative of due process where they impose an undue burden upon a defendant to negate a state of mind to avoid culpability. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684 (state could not impose burden on murder defendant to establish that he acted in the "heat of passion on sudden provocation" to reduce homicide to manslaughter); *Leary v. United States*, 395 U.S. 6 (1969) (due process prohibited penal provision authorizing jury to infer from defendant's possession of marijuana that he knew of the illegal importation).[3] Further,

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[3] *Patterson v. New York* is not contrary to this view. *Patterson* upheld a state murder statute that required an accused to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." 432 U.S. at 198. The Court merely refused to require as a matter of due process that the prosecution negate all circumstances that may constitute affirmative defenses, relying particularly on the fact that the defendant generally has access to the evidence tending to establish such defenses. 432 U.S. at 211. Thus, *Patterson* turned on the difficulty of proving factors extrinsic to the defendant's state of mind, and does not stand for the general proposition that a defendant may be required to prove his state of mind to avoid liability. *Cf. McMillan v. Pennsylvania*, 477 U.S. 79 (1986) ("visible possession of a firearm" not an element of the crime charged; characterizing *Patterson* as rejecting the claim that reasonable doubt standard required whenever a state links the severity of punishment to "the presence or absence of *an identified fact*" [emphasis added].)

"although intent is typically considered a fact peculiarly within the knowledge of the defendant, this does not, as the Court has long recognized, justify shifting the burden to him." *Mullaney*, 421 U.S. at 702; *cf. Davis v. United States*, 160 U.S. 469 (1895) (reversing murder conviction because trial judge instructed jury is was their duty to convict if the evidence was equally balanced regarding the sanity of the accused). Particularly where, as here, the defendant's failure to overcome the equivocal quantum of proof required by the preponderance standard subjects him to a substantially longer prison term, "due process demands more exacting standards." *Mullaney*, 421 U.S. at 702, n.31. *Jones v. United States, supra*, 526 U.S. at ___, 119 S.Ct. 1215, 1219 ("It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.") The standard of proof

mandated for proof of an offense represents an attempt to instruct the factfinder concerning the degree of confidence society believes he or she should have in the correctness of factual conclusions. *Winship*, 397 U.S. at 370 (Harlan, J., concurring). The longer the loss of liberty potentially imposed on the defendant, and the higher the degree of stigmatization resulting to the defendant from conviction, the clearer the adjudication must be. *Mullaney*, 421 U.S. at 699-700; *Winship*, 397 U.S. at 363, 364 ("use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.")

The Court in *Winship* rejected the suggestion that there is "only a tenuous difference" between the reasonable-doubt and preponderance standards, finding that "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted." 397 U.S. at 367-68. Likewise, in striking down Maine's penalty statute in *Mullaney*, the Court observed:

> Under [the preponderance of the evidence] burden of proof a defendant can be given a life sentence when the evidence indicates that it is *as likely as not* that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter.

421 U.S. at 703-04 (emphasis in original), citing *Winship*, 397 U.S. at 372 (concurring opinion). The Court's *amicus* submits that where a defendant is "as likely as not" to be branded with the stigma of being the perpetrator of a hate crime and subjected to a potentially doubled term of imprisonment, it is "far worse" to risk sentencing him as such than to impose a lesser, non-enhanced sentence for the substantive offense. Such a criminal justice regime "systematically ... work[s] to the disadvantage of a criminal defendants," and consequently offends due process. *Almendarez-Torres*, 523 U.S. at 244-45.

2. The New Jersey Hate Crime Law, N.J.S.A. § 2C:44-3e, Contravenes Federal Constitutional Due Process Under the Fifth and Sixth Amendments by Depriving Defendants of the Benefit of a Jury of Peers and Proof Beyond a Reasonable Doubt of Criminal Intent that is Subject to the Severest Possible Societal Stigma and Disapprobation.

Hate crime statutes are modern statutory creatures that are not analogous to any aggravating factors recognized at common law. *See* Anti-Defamation League, HATE CRIME STATUTES: A 1991 STATUS REPORT 2-5 (1991) (describing Anti-Defamation League's model hate crime statute and noting that over one-half of state statutes based on model statute). While ordinarily the Court will look to the extent to which a factor in criminal prosecution "has historically been treated 'in the Anglo-American legal tradition' as requiring proof beyond a reasonable doubt," *Almendarez-Torres*, 523 U.S. at 255, (Scalia, J., dissenting), quoting *McMillan*, 477 U.S. at 87-88, this analysis is unavailable to the Court in the case of hate crimes legislation. Nonetheless, the Court's construction of hate crime sentencing acts may be informed by its rich history of civil rights

jurisprudence, insofar as hate crime laws are an amalgam of Fourteenth Amendment equal protection jurisprudence and the criminal law. The fundamental principles this Court has derived from the Fourteenth Amendment include heightened standards of proof imposed to justify class-based legislative distinctions. For example, in striking down Virginia's miscegenation statute, the Court declared that "the Equal Protection Clause demands that racial classifications, *especially suspect in criminal statutes*, be subjected to the 'most rigid scrutiny.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis supplied). *See also Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (heightened scrutiny required for gender-based statutory distinctions); *Pickett v. Brown*, 462 U.S. 1 (1983) (heightened scrutiny required for distinctions based on illegitimacy). Because "the penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments,'" *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968), quoting *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937), that societal judgment should be subjected to the highest standard of protection for an accused perpetrator of a hate crime, not only to protect the innocent accused, but to preclude a "rush to judgment" in circumstances which have the potential to inflame community sensibilities.

Further, discriminatory animus is an issue that is bound up in the actual commission of the offense, not a predicate circumstance such as the recidivism aggravator reviewed in *Almendarez-Torres, supra*, or similar "identified facts," such as the visible possession of firearm aggravator upheld in *McMillan, supra*. The statute requires proof of discriminatory animus as a substantial factor in the commission of the offense; in other words, it mandates the establishment of a degree of causation in fact. The result in many instances may be a retrial

of the circumstances of the offense to establish the defendant's motivation, a practice the Court has found to implicate due process concerns. *See, e.g., Specht v. Patterson*, 389 U.S. 605, 608 (1967) (defendant convicted for sex crime could not be sentenced under a different statute dealing with sex offenders, since sentencing statute "makes one conviction the basis for commencing another proceeding under another Act ... That is a new finding of fact that was not an ingredient of the offence charged.")

Nor does the concern for inflammation of the jury by proof of discriminatory animus, expressed by the majority in the court below, require placing the decision on the application of the hate crime statute in the court's hands. "Evidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Wisconsin v. Mitchell*, 508 U.S. at 489; *Haupt v. United States*, 330 U.S. 631 (1947). Although Rule 404 (b) of the Federal Rules of Evidence allows discretionary introduction of evidence of prior acts where probative of, *inter alia*, motive and intent, the prophylactic provisions of Rule 403 of the Federal Rules of Evidence serve to exclude such evidence if it tends to unfairly prejudice the jury. See *Almendarez-Torres*, 523 U.S. at 268-69 (Scalia, J., dissenting); *Spencer v. Texas*, 385 U.S. 554, 561 (1967) ("The defendant's interests [in keeping prejudicial prior convictions from the jury] are protected by limiting instructions and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence even though admissible under an accepted rule of evidence.")

IV. CONCLUSION

The Court's *amicus* respectfully suggests that while considerable deference should ordinarily be accorded to the policy choices expressed by state legislatures through their penal statutory schemes, an affirmance of the Supreme Court of New Jersey 's decision upholding that state's hate crime statute would, "in the name of preserving legislative flexibility ... drain[] *In re Winship* of much of its vitality." *Patterson v. New York*, 432 U.S. at 216 (Brennan, J., dissenting). Federal due process extends to require that statutory factors that are structured and phrased as sentencing enhancements, yet go directly to the defendant's discriminatory state of mind in perpetrating the charged crime, be construed as elements of the offense, subject to the constitutional safeguards of notice and proof to a jury beyond a reasonable doubt. The decision of the Supreme Court of New Jersey should accordingly be reversed, and the case remanded for a retrial consistent with the Petitioner's constitutional rights of due process.

Respectfully submitted,

John W. Whitehead
Steven H. Aden
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

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In The

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AND ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

STEVEN B. DUKE*
Yale Law School
127 Wall Street
New Haven, CT 06511
(203) 432-4959

LISA B. KEMLER
ZWERLING & KEMLER, P.C.
108 N. Alfred Street
Alexandria, VA 22314
(703) 684-8000

KYLE O'DOWD
Families Against
Mandatory Minimums
Foundation
1612 K Street, NW
Suite 1400
Washington, DC 20006
(202) 822-6700

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200

Attorneys for Amici Curiae

**Counsel of Record*

January, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether the Due Process Clause permits the state to determine facts about a criminal charge which double the statutory maximum prison sentence without notice in the charging instrument and without proving those facts to a jury beyond reasonable doubt.

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION AND ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and FAMILIES AGAINST MANDATORY MINIMUMS FOUNDATION and THE ASSOCIATION OF FEDERAL DEFENDERS file this amicus curiae brief pursuant to this Court's Rule 37.3(a) in support of petitioner Charles Apprendi's assertion of rights under the Fourteenth Amendment. Both petitioner and respondent have granted amici NACDL and FAMM and AFD consent to file this brief, and letters of consent have been filed with the Clerk of this Court.[1]

INTERESTS OF AMICI CURIAE

Families Against Mandatory Minimums Foundation (FAMM) is a nonprofit, nonpartisan organization that conducts research, promotes advocacy, and educates the public regarding the excessive cost of mandatory minimum sentencing. This cost is not limited to public expenditures but includes the perpetuation of unwarranted sentencing disparities, disproportionate sentences, and the transfer of the sentencing function from the judiciary

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity, other than NACDL, FAMM, AFD and their members, made any monetary contribution to its preparation or submission. *See* Rule 37.6.

to the prosecution. Founded in 1991, FAMM has 30 chapters and 18,000 members nationwide. FAMM conducts sentencing workshops for its members, publishes a newsletter, serves as a sentencing clearinghouse for the media, and researches sentencing cases for pro bono litigation. FAMM does not argue that crime should go unpunished, but that the punishment should fit the crime. As an alternative to mandatory sentences, FAMM supports sentencing guideline systems that are more sensitive to differences in culpability.

FAMM's primary interest in this case is its potential impact on the interpretation of criminal statutes that prescribe mandatory sentences. In many cases, particularly under certain federal criminal statutes of the past fifteen years, facts that raise the maximum penalty also trigger a mandatory minimum sentence. A ruling in petitioner's favor on the question presented, while inoffensive to sentencing guideline systems like the U.S. Sentencing Guidelines, would result in fewer erroneous factual determinations being used to trigger mandatory minimum sentences.

The National Association of Criminal Defense Lawyers (NACDL), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. NACDL has 10,000 members nationwide – joined by 80 state and local affiliate organizations with

28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. In this case, the NACDL is concerned about the denial of procedural protections, guaranteed criminal defendants by the Fifth, Sixth and Fourteenth Amendments, when a fact that raises the maximum penalty is determined to be a sentencing factor.

The Association of Federal Defenders (AFD) was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. §3006A, and the Sixth Amendment of the United States Constitution. The AFD is a nationwide, nonprofit, volunteer organization whose membership includes attorneys and support staff of Federal Defender Offices. One of the AFD's missions is to file amicus curiae briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. Although this case arises from a state prosecution, the Court's decision could significantly affect prosecutions under federal statutes that raise the statutory maximum penalty on the basis of factors other than recidivism.

STATUTES INVOLVED

New Jersey Code of Criminal Justice

2C:39-4 Possession of weapons for unlawful purposes

a. Firearms. Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree.

2C:44-3 Criteria for sentence of extended term of imprisonment

> . . . The court shall, upon application of the prosecuting attorney, sentence a person who has been convicted of a crime other than . . . to an extended term if it finds, by a preponderance of the evidence, the grounds in subsection e.
>
> * * *
>
> e. The defendant in committing the crime acted . . . with a purpose to intimidate an individual or group of individuals because of race, color, religion, sexual orientation or ethnicity.

2C:43-7 Sentence of imprisonment for crime; extended terms

> a. In the cases designated in section 2C:44-3, a person who has been convicted of a crime . . . may be sentenced . . . to an extended term of imprisonment, as follows:
>
> * * *
>
> (3) in the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years.

2C:43-6 Sentence of imprisonment for crime; ordinary terms; mandatory terms

> a. Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment as follows:
>
> (1) In the case of a crime of the first degree, for a specific term of years which shall be fixed by the court and shall be between 10 years and 20 years;
>
> (2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years.

STATEMENT OF THE CASE

Petitioner was convicted on his pleas of guilty to counts 3, 18 and 22 of a New Jersey indictment. Counts 3 and 18 charged him with possessing a firearm with an unlawful purpose. N.J. Code of Criminal Justice (N.J.C.C.J.) §2C:39-4. Count 22 charged possession of a prohibited weapon. Counts 3 and 18 were second degree crimes, carrying a sentencing range of 5-10 years. Count 22 was a third degree crime carrying a maximum prison term of 5 years. The plea agreement called for the sentence on this count to be concurrent with the sentence on the first two counts. In accordance with a reservation in the plea agreement, the prosecution then requested, pursuant to N.J.C.C.J. §2C:44-3e, that an extended term of imprisonment be imposed on count 18, and that the sentence range thereon be doubled to 10-20 years. This is the sentence normally imposed for first degree crimes.

N.J.C.C.J. §2C:43-6(1). The reason for the doubled sentence range provided by the statute, was that the defendant "acted with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity."

After a hearing, the sentencing judge determined by a preponderance of the evidence that defendant acted with a racial purpose and imposed an enhanced sentence on count 18 of twelve years in prison. (He received a seven-year concurrent sentence on the identical, unenhanced count 3). The New Jersey Supreme Court rejected petitioner's claims that this statute and the sentence enhancement under it are unconstitutional. *State v. Apprendi*, 159 N.J. 7, 731 A.2d 485 (1999). That issue is now before this Court.

SUMMARY OF ARGUMENT

The State of New Jersey effectively created two crimes relating to unlawful possession of firearms. The first, less serious crime, consists of possessing a firearm for *any* illegal purpose that includes using it against the person or property of another. *State v. Harmon*, 104 N.J. 189, 516 A.2d 1047 (1986). This is the general intent crime, a second degree crime calling for a prison sentence of 5-10 years. The other, more serious crime, consists of possessing a firearm for a specific prohibited purpose, such as intimidation because of race. This aggravated degree of crime carries a prison sentence of 10-20 years, the same as for a first degree crime. Effectively, therefore, the crime was elevated from a second degree crime to a

first degree crime by the racial purpose. Because it put no new label on the more serious crime, however, New Jersey thought it permissible to bypass the criminal trial and the jury in determining the specific intent for the crime and directed the sentencing judge to determine that element of the crime by a preponderance of the evidence. This was an impermissible circumvention of the state's obligations under *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to prove every element of the offense beyond a reasonable doubt and its obligation, under *Duncan v. Louisiana*, 391 U.S. 145 (1968), to provide a jury trial.

This Court has never held that the right to trial by jury can be denied for factual determinations about the offense charged which are necessary to determine the allowable sentencing range. It correctly observed just last Term in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 (1999), that the Constitution appears to forbid such circumventions. If it were otherwise, the role of the criminal trial and the jury could be shrunk to little more than a formality, where the jury determines if the defendant committed *any* crime and the judge then determines the nature of that crime and selects the appropriate statutory sentencing range.

The decision below must be reversed. Doing so will not imperil any existing sentencing guideline systems or any prior decisions of this Court, such as *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

ARGUMENT

The Due Process Clause of the Fourteenth Amendment requires a state to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime . . . charged." *In re Winship*, 397 U.S. 358, 364 (1970). This obligation may not be circumvented by characterizing facts not as elements but "as factors that bear solely on the extent of punishment." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). The New Jersey Supreme Court departed from these bedrock principles in the decision below.

In broad terms, this constitutionally imposed duty applies to any facts relating to the defendant's culpability.[2] Clearly, any fact the legislature includes in the description of the offense is such but so is any fact left out of the description that increases the statutory sentencing range, at least if that fact is part of the conduct or circumstances surrounding the offense, including the accused's state of mind.[3] This Court recognized the power of this proposition last Term in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215 n.6 (1999).

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[2] *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299, 1338-48 (1977).

[3] This case does not present the question whether facts the determination of which has other direct penal consequences, such as parole eligibility or mandatory minimum sentences, can be determined without trial by jury. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Nor does it present the question whether facts relating to the defendant rather than to the offense itself, such as his prior criminal record, see *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), can be so determined.

The reason for this Due Process principle is twofold. *First*, the sentence authorized by the legislature for the crime is "a gauge of its social and ethical judgments . . . of the crime in question." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). The statutory maximum penalty is therefore a measure of the seriousness of the crime. *See Baldwin v. New York*, 399 U.S. 66, 68-69 (1970). The greater the authorized sentence, the greater the condemnation associated with conviction and the greater the stigma and other collateral consequences to be expected from conviction. Thus, whenever the maximum sentence authorized for a crime is increased, so are the penal consequences, regardless of the sentence actually imposed.

Second, other than execution of an offender, imprisonment is the most severe deprivation a society can inflict. A term of imprisonment carries with it daily degradation which often also includes inadequate medical care, assault and rape. Many lives are wrecked by the experience. A decision that a person can receive a lengthy period of imprisonment should occur only in the most careful, guarded and error-free processes society can provide. Traditionally, that has included a criminal trial, before a jury, with the prosecution required to allege and prove every essential fact beyond a reasonable doubt. It would make no sense to require these procedures to adjudicate a garden-variety charge of felony theft but to permit the addition of a ten-year prison sentence, or more, based upon even less exacting standards than are required to prevail in a routine civil dispute.

American judges have long held great power to determine the appropriate criminal sentence and to find many facts relatively informally. *See Williams v. New York*,

337 U.S. 241 (1949); *United States v. Roberts*, 445 U.S. 552 (1980). But in most cases, at least in the Twentieth Century, judicial sentencing has been ameliorative; judges have determined facts in informal settings as grounds for mitigating a sentence, for imposing a sentence not only well short of the allowable maximum but even less harsh than the typical or normal sentence imposed for the offense. *See generally* Lawrence W. Friedman, *Crime and Punishment in American History* 406-13 (1993). Judges cannot be lenient unless they are free to find facts that justify their leniency. They cannot be free to find those facts unless they are also free to find that leniency is not warranted, that the entire factual landscape not only fails to justify mitigation or leniency, but that it is aggravating and warrants a higher than normal sentence (within the statutory range). In the traditional sentencing process, moreover, an almost boundless range of facts is examined for the purpose of gaining a global impression both of the offender and of the offense. Never is any single fact in that range determinative by itself of the ultimate sentencing judgment. What the State of New Jersey seeks to uphold in this case is a radical departure not only from traditional processes but from constitutionally protected values.

If the State of New Jersey can double petitioner's prison sentence because it determines, without the adversarial testing of a trial, without a jury, and without meeting the burden of proof required in a criminal trial, that he committed the crime with one of the specified purposes, there is no limiting principle that would prohibit it from increasing the sentence tenfold or from converting a felony carrying a normal prison sentence of one year into

a life sentence. And if it can double the sentence because of a particular purpose, it can do so because of virtually any other circumstance, either of the offender or the offense, that it specifies. The cherished protections of criminal trials could be shrunk to the point where the jury would merely determine if a defendant committed a generic "crime" and all other determinations could be arrogated to the informal, largely invisible, virtually unreviewable "sentencing" process. *See Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 2255 (1998) (Scalia, J., dissenting). As this Court observed in *Jones v. United States*, the jury's role could thus be reduced to that of "low-level gatekeeping." 119 S. Ct. at 1224.

Accepting petitioner's argument in this case and applying the principles articulated in *Jones* does not imperil the holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). *McMillan* merely held that a legislature could constitutionally restrict a sentencing judge's discretion within the previously defined range of authorized punishment, upon a finding that a weapon was used in the crime, a finding that need not be made by the jury. As the Court noted in *McMillan*, the statute there "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." 477 U.S. at 88-89. While we think there is merit in Justice Stevens' position that the *Winship/Mullaney* principles also apply to facts which establish mandatory minimums as well as those which enlarge the allowable

maximums, *Jones v. United States*, 526 U.S. 227, 332 (concurring opinion), reconsideration of that issue can await another case, for *McMillan* itself distinguished mandatory minimum cases from those like the present which double the statutory maximum sentence.

Where, as here, the defendant's purpose or motive for the crime results in a doubling of the permissible sentencing range, the legislature has, as in *Jones* (*see* 119 S. Ct. at 1228), effectively created two grades of crime: one for possessing a firearm for any illegal purpose and another, far more serious, of possessing such a firearm for *specific* illegal purposes such as racial animosity. The less serious firearm possession crime is the general intent version, and the more serious crime requires specific intent. If the legislature had so labeled what it was doing, perhaps calling the aggravated offense a "hate crime" (or "unlawful possession of a firearm in the first degree") there could be no doubt of the constitutional status of petitioner's specific purpose. The difference between that and the statutory structure here is nothing more than labeling and arrangement or organization of words.

The statutory scheme involved here is analogous to the statute in *Mullaney v. Wilbur*, and traditional criminal homicide statutes, which distinguish between murder and manslaughter by requiring malice for murder but a lesser criminal intent for manslaughter. It also resembles aggravated assault crimes which punish assaults with specific purposes, such as rape, more severely than other assaults. *See generally* Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* 695-96 (2d ed. 1986). No one contends that facts which convert a simple assault to an

aggravated one can be determined solely by the sentencing judge.

Nor does this Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), support the decision below. While that decision was a strong break from tradition in allowing the maximum sentence range to be increased upon a finding of fact not proved to a jury's satisfaction, the fact in question was a prior criminal conviction, part of the defendant's history, a matter not involving the offense on trial and rarely open to serious dispute. Moreover, *Almendarez-Torres* can be justified on a collateral estoppel theory: the defendant already enjoyed full due process protections in the prior adjudication of his guilt and perhaps should not be permitted to litigate the issue again. *See* Note, *Awaiting The Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 Harv. L. Rev. 1349, 1362-1364 (1999).

Nothing in the position taken by petitioner in this case calls into question the federal guideline sentencing system or any similar system which limits the sentencing judge's discretion based upon factual findings or the absence thereof. All such systems operate within the statutory ranges prescribed by the legislature and do not attempt to expand or alter them in any way.

Moreover, the issue that triggered the expanded sentencing range in this case, the defendant's specific motive or purpose, is a *mens rea* question particularly suited to litigation before and determination by a jury. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (jury determined racial motive which aggravated the offense). It is not an objective, observable fact like a prior criminal conviction or

the use of a handgun but an elusive, vague conception requiring reconstruction of the subjectivities of the accused. Allowing such a determination to be the basis for doubling a sentence is dubious enough, but to put this power in the hands of a judge, who often has limited personal experience with racially motivated behavior, is indefensible, both as a matter of policy and of principle.

Requiring that all facts necessary to determine the sentencing maximum be proven beyond reasonable doubt to a jury is not greatly burdensome, especially where, as here, the facts to be found concern the criminal act itself and the specific purpose therefor. But as this Court noted in *Jones*, even if somewhat burdensome, the constitutional principles at stake well warrant the burden. *Jones v. United States*, 119 S. Ct. at 1228 n.11.

The decision below is an assault on the venerable role of the jury in constitutional law. A jury guards against arbitrary or mistaken imposition of criminal sanctions by rendering a verdict that authorizes a penalty within the statutorily prescribed range. If a judge can exceed this range by finding a fact, the jury's role is appropriated and the defendant's rights eroded. Society's confidence in any resultant sentence must accordingly be diminished. This is no less true when accomplished by legislative sleight of hand – adopting a generic "sentence enhancement" provision applicable to numerous crimes – than if attempted directly and forthrightly. The differences are entirely matters of legislative labeling and must not be accorded constitutional significance. The Due Process Clause of the Fourteenth Amendment is by its nature a restriction on state legislative power. No construction of that Clause

which invites or permits semantic circumlocution can be correct.[4]

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[4] Should this Court reject petitioner's claim that notice, proof beyond reasonable doubt and a jury trial are constitutionally required to determine his racial purpose in possessing the firearm, it should still reverse the court below for finding that a mere preponderance of evidence is sufficient to determine his culpability. Even if New Jersey's purpose-based enhancement is not labeled an "element," the fact that it doubles the statutory penalty requires that the prohibited purpose be reliably found by the fact-finder at sentencing. *Cf. Townsend v. Burke*, 334 U.S. 736, 741 (1948) (sentences based on materially untrue or unfounded assumptions violate due process). A finding by a mere preponderance of evidence does not adequately ensure the reliability of the sentencing decision, especially in cases such as this, where the determinative fact involves *mens rea*. A higher burden is also appropriate due to the stigma that attaches to a finding that a defendant acted out of racial animus. *Cf.* USSG §3A1.1(a) (sentencing guideline providing for 3-level increase for racially motivated crime; requiring sentencing determination "beyond a reasonable doubt").

CONCLUSION

The decision of the court below must be reversed as inconsistent with the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

STEVEN B. DUKE*
KYLE O'DOWD
LISA B. KEMLER
PETER GOLDBERGER

*Counsel of Record

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IN THE

Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari to the
Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* THE ANTI-DEFAMATION LEAGUE, IN SUPPORT OF RESPONDENT

DAVID M. RAIM
Counsel of Record for *Amicus Curiae*
CAREY G. CHILD
SAMANTHA B. MILLER
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 974-5600

OF COUNSEL:

STEVEN W. ARENT
ELIZABETH J. COLEMAN
STEVEN M. FREEMAN
MICHAEL LIEBERMAN
ERICA M. BROIDO
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017

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I. STATEMENT OF *AMICUS CURIAE* INTEREST

The Anti-Defamation League ("ADL"),[1] one of the nation's oldest civil rights/human relations organizations, was founded in 1913 "to stop the defamation of the Jewish people and to secure justice and fair treatment to all citizens alike." ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals and protects civil rights for all.

ADL has long been in the forefront on national and state efforts to deter and counter hate-motivated crimes. In 1981, after three years in which there was an alarming, nationwide increase in anti-Semitic violence, the ADL drafted and published model legislation dealing with all hate-motivated crimes. The model calls for penalty enhancement for hate-motivated crimes. Currently, forty states and the District of Columbia have enacted laws based on, or similar to, the ADL model. There is also a federal sentencing counterpart. ADL has successfully defended the constitutionality of the penalty-enhancement approach in *amicus* briefs filed nationwide, including before this Court in *Wisconsin v. Mitchell*. ADL offers the perspective of a national organization, intimately and tirelessly involved in the promotion of penalty-enhancement legislation to combat hate-motivated crime.

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[1] ADL files this brief with the consent of counsel for both parties. Counsel for ADL authored this brief in its entirety. No counsel for any party authored this brief in whole or in part, and no person or entity, other than ADL, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue here — N.J. STAT. ANN. § 2C:44-3(e) (West 1995), part of New Jersey's Ethnic Intimidation Act — responds to the legitimate concern that hate-motivated crimes should be subject to additional punishment because they cause distinctive and greater societal harm. When a court is sentencing a defendant convicted of pre-existing crimes, Section 2C:44-3(e) permits a court to impose an enhanced sentence if the judge finds that the State has proven that the crime was committed "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *State v. Apprendi,* 731 A.2d 485, 486, 487-88 (N.J. 1999) (quoting N.J. STAT. ANN. § 2C:44-3(e), as interpreted at the time of Petitioner's sentencing, and as amended).

Section 2C:44-3(e) does not diminish the role of the jury because it goes only to sentencing, does not create any new crime, or even outlaw or punish any new conduct. It applies only after a defendant is convicted of otherwise-illegal conduct. Then — just like a pecuniary-gain purpose, just like recidivism, and just like any of the other statutory factors — a defendant's hate-motivated purpose in committing a crime is treated as an aggravating factor that makes the defendant eligible for the more severe of two degrees of punishment that were already available within New Jersey's existing sentencing statutes. In this case, Petitioner fired a rifle into the home of his only African-American neighbors, Michael and Mattie Fowlkes and their three children, on multiple occasions in 1994. Upon his arrest, police discovered a number of weapons in Petitioner's home, including a rifle with laser sights and an anti-personnel bomb. Petitioner ultimately pled guilty to three of twenty-two counts of a criminal indictment: two counts of possession of a firearm for the unlawful purpose of using it against the person or property of

another; and one count of unlawful possession of a prohibited weapon, the anti-personnel bomb.

There is no dispute that criminal defendants have the right to a jury trial and proof beyond a reasonable doubt of the elements of a crime. That concern simply is not implicated here because Petitioner had such a right as to all elements of the crimes charged, including a crime with a demanding "specific intent" element. Having thus provided Petitioner with a full jury-trial right, New Jersey could properly treat a judicial finding of a hate-motivated purpose as a sentencing factor. Section 2C:44-3(e) is well supported by prior decisions of this Court that allow judges to find similar sentencing factors, including factors in capital-sentencing cases that are necessary for the imposition of the death penalty.

III. ARGUMENT

A. Our Federal System Of Government Permits New Jersey To Determine That Hate-Motivated Crimes Should Be Subject To Additional Punishment, Without Having To Create New Crimes

There is no dispute that "the Due Process Clause protects the accused against conviction except on proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970) (emphasis added). Nor can there be any genuine dispute that although *Winship* thus requires a jury trial and proof beyond a reasonable doubt for all elements of a crime, sentencing factors can properly be decided by a judge based on a preponderance of the evidence. *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998). In that regard, federalism dictates that defining and punishing crimes is much more the business of the States than the federal government, and the application of *Winship* has therefore

turned in the first instance on how the State defined the elements of the crime charged. *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). There is no basis for departing from that rule here.

1. Hate-Motivated Crimes Are A Serious Problem And Cause Distinctive Societal Harm

ADL has closely tracked one type of hate-motivated incidents — anti-Semitic violence and vandalism — since 1960. In 1979, ADL began publishing an annual "Audit of Anti-Semitic Incidents" based on data reported to ADL regional offices around the country. During just one year, 1998, 42 states and the District of Columbia reported 1,611 anti-Semitic incidents. This marked an increase of more than 2 percent in anti-Jewish activity over the prior year. In 1998, New Jersey was among the ten states with the highest incidence of reported anti-Semitic harassment, threats, and assaults. ADL statistics show that those incidents continued to rise last year.

Even standing alone, those numbers reveal a compelling national problem because of the personal and community costs behind each statistic. Of course, other groups unfortunately also are the victims of hate-motivated crimes. The FBI's most recent Hate Crime Statistics Act Report, for 1998, documented 7,775 hate-motivated crimes across the country. The majority were race-based (58%) followed by religion, sexual orientation and ethnicity. Experts argue that hate-motivated crimes are under-reported. Brian Levin, *Bias Crimes: A Theoretical & Practical Overview*, 4 STAN. L. & POL'Y REV. 165, 166 (Winter 1992-1993).

As Blackstone said long ago, "it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." *Wisconsin v. Mitchell*, 508 U.S. 476,

488 (1993) (quoting Blackstone, 4 W. Blackstone, Commentaries *16). Hate-motivated crimes are among the most destructive of the public safety and happiness. Such crimes have a distinctively greater societal impact than other crimes because an attack on an individual is also an attack on a larger group or community, with the purpose of harming both. They are more likely than others to cause an entire community to feel concerned for their safety, isolated and unprotected by the justice system. This results in fear, anger and suspicion — and even to crimes of retaliation. Levin, *supra*, at 167-68. "One need look no further than the recent social unrest in the nation's cities to see that race-based threats may cause more harm to society and to individuals than other threats." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 433 (1992) (Stevens, J., concurring).

2. New Jersey's Response To Hate-Motivated Crime Creates No New Crimes And Preserves The Right To Jury Trial On All Elements Of The Crime Charged, Including *Mens Rea*

Petitioner characterizes the statute at issue here as a "Hate-Crimes" statute and asserts that it deprived him of a jury trial on the *mens rea* element of that "crime." *Petitioner's Brief* at 3, 17, 34, 37. Although the "Hate Crimes" label might be a convenient reference, it is a misnomer here because it leads Petitioner to sidestep the central issue of this case: whether a hate-motivated purpose is a necessary element of the crime charged, such that it must be proven to a jury, even though the legislature specifically enacted it as a sentencing factor. *Petitioner's Brief* at 18 ("The 'hate' element of a hate crime cannot reasonably be characterized as a

mere sentencing consideration; it is the essence of the crime itself.")[2]

As discussed below, Petitioner's label and syllogism both are false. Section 2C:44-3(e) does not establish a "hate crime." It does not criminalize hate, racism or bigotry. Indeed, it does not create any new crime, alter the definition of any existing crime, or prohibit any new conduct. It applies only to the sentencing of a defendant that has been convicted (or, as with Petitioner, pled guilty) of otherwise-illegal conduct. As to sentencing, Section 2C:44-3(e) does not establish a new sentencing regime or a new sentencing range; it merely adds a hate-motivated purpose to the list of factors in New Jersey's pre-existing judicial sentencing regime. It therefore has no effect on the role of the jury.

Petitioner pled guilty to (among other things), violating Section 2C:39-4(a) of the New Jersey Code of Criminal Justice, possession of a firearm for an unlawful purpose. Had he not pled guilty, Petitioner would have had a full jury trial: "In order to sustain a conviction under N.J.S.A. 2C:39-4(a), the State must prove beyond a reasonable doubt the following four facts: (1) the item possessed was a 'firearm' within the meaning of N.J.S.A. 2C:39-1(f); (2) the defendant

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[2] *See also Petitioner's Brief* at 35 (Citing cases that hold as a matter of statutory interpretation that the fact in question was an element of the crime.). The fallacy that results from Petitioner's tendency to "skip" this essential part of the analysis is demonstrated by its reliance on *United States v. Gaudin*, 515 U.S. 506 (1995), a case he asserts is "intriguingly on point." *Petitioner's Brief* at 32. However, in that case the government conceded that the fact in question, materiality, was an element of the crime. *Gaudin*, 515 U.S. at 509. As Chief Justice Rehnquist observed, that concession allowed the Court to resolve the case by syllogism; but without the concession, the outcome might have been very different. *Id.* at 524 (Rehnquist, C.J., concurring).

'possessed' it, which under N.J.S.A. 2C:2-1(c) requires knowledge or awareness of his control over the item; (3) the defendant's purpose or conscious objective was to use it against the person or property of another; and (4) the defendant intended to use it in a manner that was proscribed by law." *State v. Harmon*, 516 A.2d 1047, 1059 (N.J. 1986).

New Jersey thus afforded Petitioner a right to a jury-trial on all elements of the crime, including *mens rea*.[3] Indeed, a finding of "general intent" would not have been sufficient: the State could not convict unless the jury found proof beyond a reasonable doubt of "specific intent." *Harmon*, 516 A.2d at 1054 (The mental state required is the "pre-Code concept of 'specific intent,'. . . refine[d]. . . in a manner that sought to 'dispel the obscurity' that surrounded such concepts at common law."). By his guilty plea, Petitioner established each element and admitted to possession — on two separate occasions — of a firearm (his laser-sighted rifle) with the specific intent of using it unlawfully against the person or property of another (his only African-American neighbors, Michael and Mattie Fowlkes and their three children).[4] *Peti-*

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[3] The cases cited by Petitioner regarding mental state are therefore irrelevant. *Petitioner's Brief* at 33, 37. Those cases show no more than: (1) criminal penalties may not be imposed without some element of culpable intent; and (2) that *mens rea* element of the crime must be decided by the jury and cannot be presumed. *See Morissette v. United States*, 342 U.S. 246, 274 (1952); *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978). Because Petitioner had a right to a jury trial and proof beyond a reasonable doubt of the *mens rea* element of the crime, those cases are inapplicable here. They do not support Petitioner's contention that the Constitution requires that each and every issue bearing on mental state be treated as an element of the crime. As discussed below, issues going to mental state can appropriately be treated as sentencing factors.

[4] Petitioner appears to contend that the purpose of the sentencing hearing was to determine his *mens rea* and suggests that there is genuine

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tioner's App. at 175a, 252; *State v. Apprendi*, 731 A.2d 485, 486 (N.J. 1999) At the plea hearing, Petitioner also admitted that his unlawful purpose for shooting at the Fowlkes' house was to frighten or harass the family. Joint App. at 40-41. Thus, Petitioner cannot complain that Section 2C:44-3(e) denied him a jury trial on any element of the crime with which he was charged.

3. Section 2C:44-3(e) Merely Adds One Factor To New Jersey's Pre-existing Sentencing Scheme, Does Not Diminish The Jury's Role In Sentencing, And Does Not Alter The Scope Of Statutorily-Available Punishment

As noted, New Jersey can properly entrust sentencing to the court. *See Almendarez-Torres*, 523 U.S. at 226. The statutes that Petitioner violated do not themselves specify the punishment. For example, the statute outlawing possession of a firearm for an unlawful purpose merely states that a violation constitutes a "crime of the second degree."[5] The appropriate sentence is determined by reference to other sections of the New Jersey Code of Criminal Justice, with two alternative sentencing ranges available. First, a court may impose a sentence within the range provided in Section

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doubt as to whether he had the capacity to form a hate-motivated purpose. *Petitioner's Brief* at 6, 22. However, Petitioner's guilty plea established the requisite *mens rea* and his present contention that he lacked mental capacity cannot stand in light of his guilty plea to a crime requiring a "specific intent" to use a firearm for an unlawful purpose against the person or property of another.

[5] That statute provides that "Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree." N.J. STAT. ANN. § 2C:39-4(a).

2C:43-6. That range is between five and ten years for a second-degree crime. N.J. STAT. ANN. § 2C:43-6 (a)(2) (West 1995). Second, Section 2C:43-7 authorizes an "extended sentence." For a second-degree crime, the range is between ten and twenty years. N.J. STAT. ANN. § 2C:43-7(a)(3) (West 1995).

This sentencing regime is functionally identical to judicial capital-sentencing procedures that have been approved by this Court. Under such procedures, the jury determines whether the prosecution has proven beyond a reasonable doubt all of the elements of first-degree murder and, thus, guilt or innocence. Upon conviction, the jury's role ends and two degrees of punishment (life imprisonment or death) are available to the sentencing judge. The more severe penalty is available only if the judge finds one or more statutory "aggravating factors," such as where the crime was committed for pecuniary gain, or was particularly "depraved" because the defendant relished the murder. *See e.g., Walton v. Arizona*, 497 U.S. 639 (1990) (approving such a sentencing procedure).

Here, the jury's role similarly ended when Petitioner pled guilty. Of the two alternative sentencing ranges that could apply to a second-degree crime, the "enhanced" range was available if the judge found one or more aggravating factors pursuant to N.J. STAT. ANN. § 2C:44-3 (West 1995) and after a plenary hearing.[6] Thus, for example, the court

[6] Petitioner acknowledges both notice and a plenary hearing, discussing at great length the evidence he was permitted to present. *Petitioner's Brief* at 5, 6-11. Thus, *Specht v. Patterson*, 386 U.S. 605 (1967), relied on by *amicus curiae* the Rutherford Institute, is inapplicable because that case held only that notice and an opportunity to be heard (and not a jury trial) was required on sentencing issues for which a "magnified sentence" could be imposed." *Id.* at 609-610.

could have sentenced a defendant convicted of the same offense as Petitioner to imprisonment of between ten and twenty years if it found by a preponderance of the evidence that the crime had been committed for pecuniary gain; that the defendant was a persistent offender or professional criminal; or that defendant had used a firearm in committing a prior offense.[7] N.J. STAT. ANN. §§ 2C:43-7(a)(3), 2C:44-3. Those are facts that this Court has held need not be treated as elements, even if they trigger more severe punishment. *See Almendarez-Torres*, 523 U.S. 224 (1998) (recidivism); *Monge v. California*, 524 U.S. 721 (1998) (use of a deadly weapon in the commission of a prior offense where such use was not a finding necessary to the prior conviction because it could be proven by introduction of the defendant's criminal record).

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[7] Thus, Petitioner is incorrect in repeatedly suggesting that, but for the Ethnic Intimidation Act, the maximum sentence for possession of a firearm for an unlawful purpose was ten years. *Petitioner's Brief* at 5 n.1, 18, 18 n.7, 24 n.9. In pertinent part, N.J. STAT. ANN. § 2C:43-6(a) reads: "(a) Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows: . . . (2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between 5 years and 10 years." The "otherwise provided" includes Section 2C:43-7(a), which states in pertinent part that "In the cases designated in section 2C:44-3, . . . a person who has been convicted of a crime shall be sentenced, to an extended term of imprisonment, as follows: . . . (3) In the case of a crime of the second degree, for a term which shall be fixed by the court between 10 and 20 years." N.J. STAT. ANN. § 2C:43-7(3). A hate-motivated purpose is just one of seven sentencing factors listed in Section 2C:44-3. As discussed below, those factors function "as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available" for purposes of this Court's *Winship* analysis. *See Jones v. United States*, 526 U.S. 227, 331 (1999). Thus, even prior to the Ethnic Intimidation Act, the relevant maximum sentence for the

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Thus, the Ethnic Intimidation Act did not restrict the role of the jury in sentencing, nor does it change the maximum sentence for any crime. It merely added a hate-motivated purpose to the pre-existing list of sentencing factors necessary to impose a sentence from within the more severe of two pre-existing sentencing ranges. N.J. STAT. ANN. § 2C:44-3(e).

4. The U.S. Constitution Does Not Override New Jersey's Decision To Treat A Hate-Motivated Purpose As A Sentencing Factor That Makes A Defendant Eligible For Additional Punishment Within The Pre-Existing Scope Of Statutorily-Available Punishments

a) This Court's Winship Jurisprudence Is Tempered By Respect For Competing Federalism Concerns

As discussed above, New Jersey has afforded Petitioner a right to a full jury trial and proof beyond a reasonable doubt of all elements of the crime charged. Thus, *Winship* is *prima facie* inapplicable here because it does not apply to sentencing factors. *Almendarez-Torres*, 523 U.S. at 228. By its terms — and as definitively interpreted by the New Jersey Supreme Court — Section 2C:44-3(e) is solely a sentencing statute, and not a separate crime; nor is it an element of any crime. *Apprendi*, 731 A.2d at 496. *Winship* does not invalidate New Jersey's decision to treat a hate-motivated purpose as a sentencing factor.

While *Winship* and its progeny demonstrate this Court's very appropriate vigilance against genuine intrusions

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second-degree crime of possession of a firearm for an unlawful purpose was 20 years.

into a criminal defendant's right to a jury determination "of every fact necessary to constitute the crime with which he is charged," that Constitutional concern has never been applied in a vacuum. Instead, this Court has always interpreted *Winship* in light of competing federalism concerns, recognizing that it "goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977) (citation omitted). *Accord McMillan* v. *Pennsylvania*, 477 U.S. 79, 86 (1986) (courts should "hesitate to conclude that due process bars a State from pursuing its chosen course in the area of defining crimes and prescribing penalties.")

Of course, this Court will not allow a State to evade its burden as to the elements of the crime by defining away the elements of the crime as sentencing factors in order to reallocate burdens of proof. *See Patterson*, 432 U.S. at 215 ("*Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense"). With that caveat, however, the administration of justice is for the individual States, and a State's decision "in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* 432 U.S. at 201 (citations omitted).

b) New Jersey Has Not Sought To Evade *Winship*

Even looking beyond the State's usually-dispositive definition of N.J. STAT. ANN. § 2C:44-3(e) as sentencing

factor, there is no basis here for intruding on New Jersey's long-recognized priority in defining and punishing crimes. New Jersey's use of a hate-motivated purpose as a sentencing factor evidences neither an intent, nor does it have the effect, of evading its burden of proving all elements of a crime to a jury and beyond a reasonable doubt.

As discussed above, the role of the jury is undisturbed by Section 2C:44-3(e), which does not create any new crime, redefine the elements of any crime, or reallocate any burden of proof. Section 2C:44-3(e) applies only after a defendant has been found guilty (with the right to a full jury trial on all elements) of a pre-existing crime. Thus, an affirmance here would in no way undermine *Winship*. It would not permit the States to define elements out of crimes, remove *mens rea* requirements, or abolish traditional distinctions between crimes. *See Mullaney*, 421 U.S. at 698; *Patterson v. New York*, 432 U.S. 197, 215 (1977). "There should be no mistake that the Court would not permit the Legislature (even were it so inclined) to remove traditional *mens rea* or grading factors (such as the absence of passion/provocation in murder) from the substantive definition of a crime to be determined by a jury and reallocate them for determination by a judge as part of the sentencing process."[8] *Apprendi*, 731 A.2d at 495.

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[8] Because this Court will retain the power under *Winship, Mullaney, Patterson, McMillan* and *Almendarez-Torres* to prevent any genuine incursion into the province of the jury, this Court should not accept the invitation to decide this case on the basis extreme hypotheticals. *Brief of Amici Nat'l Ass'n Of Criminal Defense Lawyers, et al.* at 7, 10-11. This case should instead be decided, as the New Jersey Supreme Court has done, based on the facts here, which do not offend *Winship*. Because of the significant federalism costs of an intrusion by the federal judiciary into the long-recognized priority of the States in defining and punishing crimes, Section 2C:44-3(e) should not be invalidated on the basis of the

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Nor would an affirmance allow sentencing to become the "tail that wags the dog" of a substantive offense that effectively outlaws new conduct by treating it as a sentencing factor. *See McMillan*, 477 U.S. at 88; *Almendarez-Torres*, 523 U.S. at 243. The fact that Section 2C:44-3(e) does not outlaw any new conduct confirms that New Jersey's use of a hate-motivated purpose as a sentencing factor was not an attempt to evade the requirements of *Winship*, and would also prevent this case from acting as a precedent for any legislature so inclined.

c) New Jersey Has A Constitutionally-Significant Reason For Treating A Hate-Motivated Purpose As A Sentencing Factor

As the New Jersey Supreme Court observed, crafting legislation to combat hate-motivated criminal activity requires careful balancing of competing Constitutionally-significant interests. *Apprendi*, 731 A.2d 485, 496 (N.J. 1999). Because Section 2C:44-3(e) does not create any new crimes and instead goes only to the sentencing of conduct that is independently unlawful by pre-existing statute, the New Jersey Legislature has made clear to its citizens that it is not punishing thought and is a partner with the courts in protecting all possible First Amendment values.[9] *See Apprendi*, 731 A.2d at 494, 496 (Observing that "the statute does not create a separate offense calling for a separate penalty" and stating that "We do not punish thought.") At the same time, the imposition of additional punishment where pre-existing criminal statutes were violated for a hate-motivated purpose is necessary to address the legitimate concern that hate-motivated crimes injure broad communities and cause distinctive societal harms.

Such balancing of competing values is for the New Jersey legislature, especially where, as here, the statute in question does not have the intent or effect of diminishing the role of the jury. "Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch."[10] *Patterson v. New York*, 432 U.S. 197, 210 (1977).

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mere possibility that a hypothetical legislature might one day be tempted to evade *Winship*. *See Patterson*, 432 U.S. at 211 ("Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant. This did not lead to such abuses or to such widespread redefinition of crime and reduction of the prosecutor's burden that a new constitutional rule was required. This was not the problem to which *Winship* was addressed.").

[9] As he must in light of *Mitchell*, Petitioner concedes that this case turns solely on whether the Constitution requires different procedures than those used here; neither the First Amendment, nor the general constitutionality of statutes that address hate-motivated crime, are at issue here. *Petitioner's Brief* at 4.

[10] New Jersey is free, within the broad limits imposed by the Constitution, to craft its own unique response to criminal justice problems. Thus, although New Jersey's approach differs from the ADL model statute in not making the hate-motivated purpose an element of the crime, federalism requires '[t]olerance for a spectrum of state procedures dealing with a common problem of law enforcement." *McMillan*, 477 U.S. at 90 (citation omitted). For the same reason, Petitioner's purported survey of various statutes dealing with hate-motivated crimes is constitutionally irrelevant. *See McMillan*, 477 U.S. at 90 ("That Pennsylvania's particular approach [to punishing armed felons] does not render Pennsylvania's choice unconstitutional."); *Patterson*, 432 U.S. at 211 (The fact that a majority of States have assumed the burden of disproving affirmative

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5. This Court's Prior Decisions Confirm That A Hate-Motivated Purpose Is A Permissible Sentencing Factor

A hate-motivated purpose is an appropriate sentencing factor. A despicable motive and societal impact are traditional factors used in judicial sentencing. *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993) ("The defendant's motive for committing the offense is one important factor" traditionally considered by judges in sentencing.); *Apprendi*, 731 A.2d at 495 ("A finding of a biased motive or purpose to intimidate, like the factor of recidivism in the *Almendarez-Torres* analysis is a very traditional sentencing factor" and New Jersey law has long permitted the sentencer to take the gravity of the harm inflicted into account.); *State v. Apprendi*, 698 A.2d 1265, 1269 (N.J. Super. App. Div. 1997) (In "New Jersey, 'motive traditionally has been an important factor for judges to consider at sentencing.'") (citation omitted); 1 W. LeFave & A. Scott, *Substantive Criminal Law* § 3.6(b), p. 324 (1986) ("Motives are most relevant when the trial judge set's the defendant's sentence, and it is not uncommon for a defendant to receive. . . a rather high sentence because of his bad motives.").

Contrary to Petitioner's assertion (*Petitioner's Brief* at 23, 33), a sentencing judge may also consider a defendant's "purpose" or "mental state." *Walton v. Arizona*, 497 U.S. 639, 645-47 (1990) (Factors considered in imposing death penalty included sentencing judge's finding that the defendant's committed the crime for pecuniary gain, and that the

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defenses does not "mean that States that strike a different balance are in violation of the Constitution."). ADL agrees, however, that the specific issues in this case do not implicate the Constitutionality of such statutes generally.

crime was especially "depraved," which was defined to mean that the defendant "relished the murder."). It is also appropriate to consider facts bound up with the commission of the crime and its impact. *Id.* (Considerations in imposing death penalty included sentencing judge's finding that crime was "especially cruel," which was defined to mean that the defendant "inflict[ed] mental anguish or physical abuse before the victim's death.").

Petitioner's contention that *Winship* prohibits the use of a sentencing factor to impose an increased sentence is similarly contrary to precedent. *Petitioner's Brief* at 16-17. This Court has expressly rejected the argument that any fact that affects the "degree of criminal culpability" or the "severity of punishment" must be treated as an element of the crime. *Patterson v. New York*, 432 U.S. at 215 n.15; *McMillan*, 477 U.S. at 84. Even if a sentencing factor (recidivism) results in a ten-fold increase in the available sentence, it is not thereby converted into an element of the crime. *Almendarez-Torres*, 523 U.S. at 226.

The analysis of *Almendarez-Torres* applies here. Like the statute at issue in that case, Section 2C:44-3(e) requires the imposition of specific sentence within a relatively narrow range and does not presume guilt or the existence of any element of a crime, create a separate offense, change the definition of any crime, or outlaw any new conduct. *See Almendarez-Torres*, 523 U.S. at 243. Moreover, as discussed above, motive and societal harm are, like recidivism, traditional sentencing factors. *Id.*

Petitioner's attempts to limit *Almendarez-Torres* to recidivism must fail in light of this Court's contrary holdings in the capital-sentencing context. *Petitioner's Brief* at 24-25, 35. *Almendarez-Torres* cited those cases in rejecting the same argument that Petitioner makes here: that "any signifi-

cant increase in a statutory maximum sentence would trigger a Constitutional 'elements' requirement." *Almendarez-Torres*, 523 U.S. at 246. Such "a rule would seem anomalous in light of existing case law that permits a judge, rather than a jury, to determine the existence of factors that can make a defendant eligible for the death penalty, a punishment far more severe than that faced by petitioner here." *Id.*

Indeed, there can be no more severe increase in punishment than a decision to impose the death penalty. "The sentence of death differs absolutely, not in degree, from any other sentence . . ." *Spaziano v. Florida*, 468 U.S. 447, 473 (1984) (Stevens, J., dissenting) (citation omitted). Nor can there be a stronger expression of "disapprobation" than a decision to impose the death penalty. The "calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity" and "an expression of the community's outrage — its sense that an individual has lost his moral entitlement to live." *Id.* at 469, 469 n.3 (citation omitted). While the ADL does not take a position for or against the imposition of the death penalty generally, the point here is simple: if the facts which are required for the imposition of the death penalty, instead of life imprisonment, can be decided by a judge rather than a jury, New Jersey is also permitted to use a judge's finding of a hate-motivated purpose to apply the higher of two statutorily-available sentencing ranges.

As noted above, the capital-sentencing procedures approved in *Walton* track the procedures used here. "Under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved." *Walton*, 497 U.S. at 709 (Stevens, J., dissenting). Yet, this Court rejected the argument that a jury, rather than the judge, was required to find the existence of such aggravating factors. *Id.* at 647. "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court." *Id.* (emphasis added and citation omitted).

B. *Jones v. United States* Does Not Support A Contrary Result

Jones v. United States, 526 U.S. 227 (1999), does not change the analysis for three reasons. First, that case was decided on statutory-interpretation grounds, and the Constitutional discussion was by way of identifying an issue of "Constitutional doubt" that would have arisen had the statute been interpreted in another way. *Jones*, 526 U.S. at 324. The Court was careful to characterize that discussion as an expression of "Constitutional doubt" and not a holding. *Jones*, 526 U.S. at 326 n.6, 331 n.11. Unlike *Jones*, this is not a case of statutory interpretation. Further, principles of federalism must be considered in this case because the States have the primary responsibility for defining and punishing crimes. *See Patterson*, 432 U.S. at 201. That concern was not present in *Jones*, which involved a federal statute. Thus, *Jones* is not controlling.

Second, although *Jones* articulated — as an expression of "Constitutional doubt" — the proposition that a sentencing factor that increased the maximum could thereby be considered an element of the crime (526 U.S. at 326 n.6), that opinion's discussion of *Walton* also demonstrates that the sentencing scheme at issue here does not "increase the maximum" for purposes of the Court's analysis. In the capital-sentencing scheme at issue in *Walton*, Arizona law provided two alternative degrees of punishment for a defendant convicted of first-degree murder: life imprisonment or death. A defendant became eligible for the more severe of the two statutorily-available degrees of punishment if the judge found

one or more aggravating factors. *Walton*, 497 U.S. at 644. Even though a judicial finding of at least one aggravating factor was necessary to actually impose the death penalty, that punishment was within the scope of punishments available once the jury convicted a defendant of first-degree murder. On that basis, *Jones* indicated that the judge's findings of aggravating factors could properly be characterized "as a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *Jones*, 526 U.S. at 331.

The same is true here. New Jersey law provides two alternative degrees of punishment for second-degree crimes: the sentence range specified in Section 2C:43-6(a)(2), or the more severe sentencing range provided in 2C:43-7(a)(3). As with *Walton*, a judge must find one or more of the aggravating factors listed in Section 2C:44-3 in order to apply the more severe sentencing range. *Id.* However, because the more severe range is within the scope of statutorily-available punishments for a defendant convicted of a second-degree crime, the aggravating factors do not "raise the maximum" for purposes of the *Jones* analysis. It is properly characterized as "a choice between a greater and a lesser penalty, not as a process of raising the ceiling of the sentencing range available." *See Jones*, 526 at 331.

Third, if the procedures here and in *Walton* are viewed as "raising the maximum," the rationale of *Jones* is so undercut that it cannot be viewed as anything more than an accommodation to articulating a "Constitutional doubt." If *Jones* is interpreted to apply here, it could not be reconciled with either *Almendarez-Torres* or with capital-sentencing cases such as *Walton*.

For example, *Jones* suggested that *Almendarez-Torres* cannot be applied to sentencing factors other than recidivism

because, unlike other sentencing factors, "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." 526 U.S. at 330. However, despite *Almendarez-Torres*' repeated discussion of recidivism, the aspect cited by *Jones* as a basis for limiting that case to recidivism was not discussed. Instead, *Almendarez-Torres* emphasized a characteristic that recidivism shares with the sentencing factor at issue here — traditional use as a sentencing factor. *Almendarez-Torres*, 523 U.S. at 230.

Nor does *Jones* (if read to apply here) provide a convincing rationale for distinguishing the capital-sentencing cases cited by *Almendarez-Torres* that permit a judge to impose the death penalty on the basis of findings other than recidivism. *Walton*, 497 U.S. 639 (finding that the crime was heinous, cruel or depraved and committed for pecuniary gain); *Hildwin v. Florida*, 490 U.S. 638 (1989) (same); *Spaziano*, 468 U.S. 447 (crime was heinous and atrocious). *Jones* merely suggests that those cases did not raise the issue of whether a jury must find the facts requisite to imposing a more severe punishment because the factors at issue merely were "standards to guide the choice between the alternative verdicts of death and life imprisonment." *Jones*, 526 U.S. at 331. But as discussed above, this contradicts the clear language of *Walton*: "Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court."[11]

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[11] The *Jones* Court's assertion that *Walton* addressed sentencing factors that were merely "standards to guide the choice between the alternative verdicts of death and life imprisonment," rather than a finding of fact that triggers the availability of a more severe sentence, apparently stems from language quoted in *Walton* from *Poland v. Arizona*, 476 U.S. 147 (1986). However, both *Walton* and *Poland* make clear that a defendant is eligible

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Walton, 497 U.S. at 647 (emphasis added and citation omitted). The *Walton* court reached that holding over Mr. Justice Stevens' dissent, which not only made clear that "under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved," but also cited *McMillan* in arguing that the aggravating factors therefore "operate as statutory 'elements' of capital murder under Arizona law because in their absence, that sentence is unavailable . . . ."[12] *Walton*, 497 U.S. at 709, 709 n.1.

Thus, as in *Almendarez-Torres,* the capital-sentencing cases demonstrate that New Jersey may properly treat a hate-motivated purpose as a sentencing factor, rather than an element of the crime, even if the result is to increase the maximum sentence faced by Petitioner.[13] Especially in light of the significantly higher stakes involved in capital sentencing, any suggestion that a higher standard or a different definition of "element" should apply here should be rejected. As observed by this Court in *McMillan*, "[t]here is, after all, only one Due Process Clause in the Fourteenth Amendment." 477 U.S. at 91.

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for the death penalty only if the judge finds at least one aggravating factor. *Walton*, 497 U.S. at 709, 709 n.1 (Stevens, J., dissenting); *Poland*, 476 U.S. at 1755.

[12] This Court also analyzed *McMillan* in upholding a Florida capital-sentencing statute that permitted the judge to override a jury recommendation and required the judge to find at least one aggravating factor in order to impose the death penalty. *Spaziano*, 468 U.S. at 459 (1984) (Upholding a statute permitting a judge to impose the death penalty even though the jury had recommended only life imprisonment and stating that "[t]he Sixth Amendment has never been thought to guarantee a right to jury determination of [the appropriate punishment to be imposed on an individual]."); *Hildwin v. Florida*, 490 U.S. 638, 639, 640 (1989) (Upholding the same statute even though the finding of at least one aggravating factor by the judge was necessary to impose the death penalty. "Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is a 'sentencing factor that comes into play only after the defendant has been found guilty.' Accordingly, the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.") (citation omitted).

[13] Any argument by Petitioner that a judge can decide the existence of a hate-motivated purpose, but must use a higher standard than preponderance of the evidence, is without merit. The line of cases cited by Petitioner involving civil commitment, deportation, denaturalization and the termination of parental rights are inapplicable. *Petitioner's Brief* at 19. Those cases do not involve the burden of proof required for sentencing following a conviction of crime where the defendant had a right to a trial by jury and proof beyond a reasonable doubt. Petitioner neglects to advise this Court that *McMillan* distinguished the two cases upon which he principally relies on precisely that ground. *McMillan*, 477 U.S. at 92 n.8 (Distinguishing *Santosky v. Kramer,* 455 U.S. 745 (1982), and *Addington v. Texas*, 441 U.S. 418 (1979), on the ground that "sentencing takes place only after a defendant has been adjudged guilty beyond a reasonable doubt. Once the reasonable-doubt standard has been applied to obtain a valid conviction, 'the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him.'"). Thus, *McMillan* rejected the argument that sentencing facts must be proven by more than a preponderance of the evidence. *McMillan*, 477 U.S. at 91. Another case cited by Petitioner actually undercuts his argument. *United States v. Hopper*, 177 F.3d 824 (9th Cir. 1999) is a federal sentencing guidelines case in which the court held that the sentencing judge's departure, not just from the sentencing range, but from the usually-applicable guidelines — and seven- and four-level enhancements of the defendants' sentences — was not such an "extremely disproportionate effect" as to alter the general rule stated in *McMillan*, 477 U.S. at 92 n.8, and *United States v. Restrepo*, 946 F.2d 654, 661 (9th Cir. 1991), "that due process does not require a higher standard of proof than preponderance of the evidence to protect a convicted defendant's liberty interest in the accurate application of the Guidelines." *See Hopper*, 177 F.3d at 832-33.

IV. CONCLUSION

Section 2C:44-3(e) had neither the intent, nor the effect, of diminishing the role of the jury in the conviction and sentencing of Petitioner. He pled guilty to pre-existing crimes for which he had a right to a full jury trial and proof beyond a reasonable doubt of each element. New Jersey has not sought to evade its burden of proving guilt beyond a reasonable doubt by redefining elements out of a crime or reallocating burdens of proof. Section 2C:44-3(e) does not create any new crime, does not alter the definition of any existing crime, and does not outlaw or punish any new conduct.

As for sentencing, a judicial finding under Section 2C:44-3(e) is just one of seven aggravating factors that make a defendant eligible for a sentence within the more severe of two pre-existing sentence ranges. Thus, even in the absence of Section 2C:44-3(e), a defendant that pled guilty to the same crimes as Petitioner did could have been sentenced to up to twenty years imprisonment based on factors (recidivism or the use of a firearm in a prior offense) that this Court has already determined need not be treated as elements of the crime even if they result in a sentence enhancement.

In short, Section 2C:44-3(e) does not diminish the role of the jury and thus presents no threat to the concerns of *Winship*. Indeed, the sentencing factors and procedures at issue here are functionally identical to in those in capital-sentencing cases in which this Court rejected arguments that a jury trial was required for facts requisite to the ultimate sentence enhancement: the death penalty. A different outcome here could be explained only by the most tortured reading of those precedents that could not justify an intrusion on these facts into the long-recognized priority of the States

in defining and punishing crimes. The decision of the New Jersey Supreme Court should be affirmed.

Respectfully Submitted,

DAVID M. RAIM
Counsel of Record for *Amici Curiae*
CAREY G. CHILD
SAMANTHA B. MILLER
CHADBOURNE & PARKE LLP
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 974-5600

OF COUNSEL:

STEVEN W. ARENT
ELIZABETH J. COLEMAN
STEVEN M. FREEMAN
MICHAEL LIEBERMAN
ERICA M. BROIDO
ANTI-DEFAMATION LEAGUE
823 United Nations Plaza
New York, NY 10017

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Supreme Court of the United States

CHARLES C. APPRENDI, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of New Jersey

BRIEF OF AMICI CURIAE BRUDNICK CENTER ON VIOLENCE AND CONFLICT, CALIFORNIA ASSOCIATION OF HUMAN RELATIONS ORGANIZATIONS, CENTER FOR DEMOCRATIC RENEWAL, CENTER ON HATE & EXTREMISM, HATEWATCH, NATIONAL ASSOCIATION OF HUMAN RIGHTS WORKERS, AND NORTHWEST COALITION FOR HUMAN DIGNITY IN SUPPORT OF RESPONDENT

BRIAN H. LEVIN
Counsel of Record
California State University,
San Bernardino
Department of Criminal Justice
5500 University Parkway
San Bernardino, CA 92407
(909) 880-7711
Attorney for Amici Curiae

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QUESTION PRESENTED

Does New Jersey's bias-motivated crime sentencing enhancement provision codified at N.J. Stat. Ann. § 2C:44-3(e), which gives a judge authority to impose an additional term of incarceration on the sentence of a convicted criminal, upon a showing of a bias motive by a preponderance of the evidence, violate the Constitution?

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The *amici* academic and civil rights organizations described below, representing all regions of the nation, support the enactment and subsequent enforcement of sentence enhancement provisions against those convicted of bias-motivated crimes. *Amici* has received consent from both the petitioner and respondent to file this brief with the Court.

The *Brudnick Center on Violence and Conflict* at Northeastern University in Boston is a national education and public policy organization devoted to the analysis of the causes and possible solutions relating to violence and conflict in American society.

The San Francisco based *California Association of Human Relations Organizations* is a statewide human rights and educational organization devoted to the implementation of creative solutions to the problems of discrimination and hate violence.

The Atlanta, Georgia based *Center for Democratic Renewal* (CDR) is a national nonprofit clearinghouse for information on constructive non-violent responses to hate group activity and bigoted violence. Founded in 1979 as the National Anti-Klan Network, today, the CDR conducts programs, research, leadership training, community organizing, public education and litigation. Its

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

thousands of members and supporters are located throughout the United States.

The California based *Center on Hate & Extremism* is a non-partisan national public policy and educational organization devoted to the study of the characteristics and proposed solutions relating to bias-motivated violence.

Hatewatch is a nonprofit Internet based civil rights organization based in Cambridge, Massachusetts. *Hatewatch* serves as a resource for information on extremists, hate crime, and the legal responses to these problems.

The *National Association of Human Rights Workers* ("NAHRW"), organized in 1947, is composed of individuals throughout the United States who are engaged in human and civil rights work as professionals. The NAHRW encourages the collection and sharing of ideas and information on ways to improve inter-group relations and reduce bias-motivated violence.

The *Northwest Coalition for Human Dignity* is a regional civil rights organization based in Seattle, Washington devoted to fighting prejudice and intolerance through creative community based means and appropriate legislative measures.

SUMMARY OF ARGUMENT

New Jersey's bias-motivated crime sentencing enhancement provision, codified at N.J. Stat. Ann. § 2C:44-3(e) is a constitutional exercise of the legislature's authority to define crimes and the mechanism by which they are punished. *Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993). States have traditionally relied on a convicted criminal's motive as a sentencing factor. Motive in its usual form is distinct from intent and not an essential element of an offense. *Pointer v. United States*, 151 U.S. 396, 415 (1894).

In this particular instance the New Jersey legislature has taken an especially egregious type of motivation, bias motivation, and codified it as a specific factor at sentencing. The legislature did not create a new category of offense, nor impermissibly reclassify an existing material criminal element merely as a sentencing factor to avoid constitutional requirements. Rather, the legislature created an overlay motive-based sentence enhancer applicable to a broad range of complete and wholly intact statutes.

Defendants are not constitutionally entitled to a jury trial on every fact that may impact on their sentence. *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1986); *Patterson v. New York*, 432 U.S. 197, 214 (1977). While extra punishment is afforded by this enhancer, the added penalty is not of a degree that distinguishes it from that of other allowable sentence enhancers. The structure of the bias-motivated enhancement statute as a broadly applicable

overlay provision, coupled with its clear wording, prescribed burden of proof, and its reliance on motive establish that the statute should be applied precisely as New Jersey's legislature intended it: as a sentencing factor rather than as an essential element of any particular offense. See generally, *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Because bias motivation is a form of a permissible and traditional sentencing factor, it may be established by a judge upon a showing of preponderance of the evidence.

ARGUMENT

BECAUSE MOTIVE IS DISTINGUISHABLE FROM INTENT IT HAS TRADITIONALLY BEEN APPLIED AS A SENTENCING FACTOR RATHER THAN AS AN ELEMENT

The sentencing enhancement provision for bias-motivated conduct at issue in this case, N.J. Stat. Ann § 2C:44-3(e), "Criteria for sentence of extended term," properly invokes motive as a primary sentencing factor, rather than as an element of the substantive underlying offense. The enhancer provides for an extended term when an underlying crime is found by the court to have been committed "with a purpose to intimidate . . . because of race, color, religion, sexual orientation or ethnicity" by a preponderance of the evidence. Petitioner, after an adjudication of guilty for an underlying crime, received an additional two year term of incarceration out of a possible ten year term because he demonstrated a

racially biased motive when he fired a gun into the home of a sleeping African-American family.

Motive, like other sentencing factors, is typically most applicable after a defendant has been convicted of an underlying crime. As this Court stated in *Wisconsin v. Mitchell*, 508 U.S. at 485 (1993) : "Traditionally, sentencing judges have considered a wide variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted defendant." The Court in *Mitchell* continued (*quoting* 1 Wayne LeFave & Austin Scott, *Substantive Criminal Law* § 3.6(b), p. 324 (1986)): "Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives." Over a century ago this Court recognized that: "The presence or absence of a motive for the commission of the offense charged is always a legitimate subject of inquiry, . . . but it is not in any case indispensable to a conviction. It is not an element of the burden of proof the law devolves upon the prosecution whether the agency or connection of the accused is manifested by direct and positive evidence or only by circumstantial evidence that a motive or inducement to commit." *Pointer v. United States*, 151 U.S. 396, 414 (1894) (*quoting Clifton v. State*, 73 Ala. 473, 478-479 (1883)).

Generally speaking motive differs from intent in several important ways. In its simplest definition criminal intent refers to the *mens reas* or the level of awareness or purposefulness one has in relation to the criminal act or

actus reus.[2] Traditionally, a punishable crime results when this culpable intent combines with a criminal act or omission to produce an illegal result for which the offender has no exculpatory defense. While intent answers the required "what" query in relation to a criminal mindset, motive answers "why"?

Motive need not be an element of an offense to have a bearing on punishment. In some instances, however, motive is a material *mens rea* element of an offense that must be proved at trial beyond a reasonable doubt before a jury. Burglary, for example, punishes those who enter a building under certain circumstances "with purpose to commit a crime therein." Model Penal Code § 221.1 With certain offenses motive is transformed from a post conviction sentencing factor used to assess the length of punishment into a form of intent used to establish guilt. As Boston University Law School Professor Frederick Lawrence explains: "The formal distinction, therefore, turns entirely on what are considered to be the elements of the crime. What is a matter of intent in one context may be the matter of motive in another." Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law,* 108 (1999).

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[2] Criminal motive is "[S]omething in the mind or that condition of mind which incites to action or induces action, or gives birth to a purpose. Distinguishable from intent which represents the immediate object in view while motive is the ulterior intent." Henry Campbell Black, *Black's Law Dictionary,* 197 (5th ed. 1983). Another commentator explained, "Specifically, intent concerns the mental state provided in the definition of an offense for assessing the actor's culpability with respect to the elements of an offense. Motive, by contrast, concerns the cause that drives the actor to commit the offense." Frederick M. Lawrence, *Punishing Hate: Bias Crime Under American Law,* 108 (1999)

BECAUSE A BIAS MOTIVE IS A FORM OF MOTIVE, IT TOO MAY BE PUNISHED AS A SENTENCING FACTOR RATHER THAN AS AN ELEMENT OF AN OFFENSE

A specific bias motive penalty enhancer statute is not necessary for such motivation to play a role in punishment at sentencing. The Florida District Court of Appeal upheld the use of a defendant's bias motive as a proper basis for an upward departure in a criminal sentence where the state's bias-motivated penalty enhancer law did not apply to the underlying substantive statute. *Grant v. State,* 586 So. 2d 438 (Fla. App. 1991); *Wray v. State,* 639 So. 2d 621 (Fla. App. 1994). Federal courts have also allowed an upward departure in a criminal's sentence because of his racially biased motive for committing a non-civil rights offense at a time when the Federal Sentencing Guidelines did "not explicitly address racist motivation for criminal conduct." *United States v. McAninch,* 994 F.2d 1380, 1387-89 (9th Cir. 1993), *cert. denied,* 510 U.S. 949 (1993). This Court has previously established that a judicial finding of racial motivation was sufficient to overturn a jury recommendation of life imprisonment in favor of a death sentence in a capital murder case. *Barclay v. Florida,* 463 U.S. 939, 949-950 (1983). In *Barclay,* this Court found that a defendant's desire to start a race war was relevant to a variety of other statutory factors. *Id.* Thus, evidence of a racial bias motivation relevant to the commission of a crime may be introduced before a sentencing proceeding: "The Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing merely because those beliefs and associations are protected by

the First Amendment." *Dawson v. Delaware*, 503 U.S. 159, 165 (1992).

As with motivation in general, a legislature can make bias motivation a material intent factor which must be proven beyond a reasonable doubt, or in the alternative merely a statutory required factor at sentencing, with a burden of proof of its choosing.

> The justice system adjusts culpability for conduct according to the level of intentionality, such as purposefulness, recklessness, or negligence. However, as the *Mitchell* decision found, even within the same level of intentionality, the law frequently makes distinctions based on the reason why a crime was committed. Motive is often more than a tangential consideration, or even a factor at sentencing – it is frequently made a material element of a particular offense.

Brian Levin, *Hate Crimes: Worse by Definition*, 15 J. CONTEMPORARY CRIM. JUST. 6, 12 (1999). Professor Lawrence explains: "Consider the bias crime of a racially motivated assault upon an African-American. There are two equally accurate descriptions of this crime, that is, two different ways in which a state might define the elements of this bias crime: one describes the bias as a matter of *intent*; the other, as a separate matter of *motive*." *Punishing Hate: Bias Crime Under American Law: supra* at 108. California has enacted a stand alone intent-oriented statute that makes it a crime to interfere with one's civil rights "because of race" and other status characteristics. California Penal Code § 422.6. In Wisconsin the legislature decided that the intentional and discriminatory selection of a victim

should be a sentence enhancer. Unlike some other sentence enhancers which only require proof by a showing of preponderance of the evidence, the Wisconsin legislature set the burden of proof at beyond a reasonable doubt. Wis. Stat. § 939.645 (1989-90) Previously, this Court ruled unanimously that Wisconsin could constitutionally enact and enforce a sentence enhancement statute that punished the same criminal conduct more severely when committed on the basis of race and other protected group categories. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

Not all states, however, have opted to punish bias-motivated crime in the same way:

> Because the bias motivation is not an element of the underlying offense, the government in seeking to establish an aggravating factor or to obtain an enhanced penalty may not bear the same burden of proof that it would in establishing an essential element. New Jersey's and North Carolina's statutes specifically provide that the grounds supporting an extended term be found by the court by a "preponderance of the evidence." Alaska requires that factors in aggravation be established by "clear and convincing evidence."

Lu-In Wang, *Hate Crimes Law* (1995), § 10.03[2d].[3] Variations in how states punish a particular crime are simply not a basis for concluding that one state's approach is constitutionally suspect:

> [T]he fact that the States have formulated different statutory schemes to punish armed felons is

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[3] N.C. Gen. Stat. § 15A-1340.16(d)17; Alaska Stat. Ann. § 12.55.155(f).

> merely a reflection of our federal system, which demands "tolerance for a spectrum of state procedures dealing with a common problem of law enforcement," *Spenser v. Texas*, 385 U.S. 554, 566 (1967) [citations omitted] That Pennsylvania's particular approach has been adopted in few other states does not render Pennsylvania's approach unconstitutional.

McMillan v. Pennsylvania, 477 U.S. 79, 89 (1986).

New Jersey's enactment and enforcement of its bias-motivated crime statute are valid because generally states have the constitutional authority to determine how they punish and define crimes. New Jersey's legislature properly followed its mandate: "for the primary responsibility for fixing punishment lies with the legislature." *Wisconsin v. Mitchell*, 508 U.S. at 486. As this Court stated in *Patterson v. New York*, 432 U.S. 197, 201-202 (1977):

> It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality opinion), and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause "unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

THE OPERATION OF NEW JERSEY'S BIAS MOTIVATION ENHANCER LAW DOES NOT CONTRAVENE EXISTING REQUIREMENTS RELATING TO SENTENCING FACTORS

New Jersey's bias-motivated sentence enhancer does not contravene established principles relating to the constitutionality of sentencing factors. The legislature did not diminish, constrict or evade the state's burden of proving guilt beyond a reasonable doubt for all of the material elements of an underlying crime. *McMillan v. Pennsylvania*, 47 U.S. at 87-88. While the *McMillan* case dealt with a mandatory minimum provision as opposed to an increased maximum as is the case here, this Court has subsequently made it clear that such a difference in and of itself is not constitutionally significant. *Almendarez-Torres v. United States*, 523 U.S. at 243. In addition the magnitude of the increase in the maximum authorized sentence in New Jersey's statute is well within a range that the Court has found permissible. *Almendarez-Torres v. United States*, 523 U.S. at 236. The effect of New Jersey's bias crime enhancer is not analogous to the impermissible penalty disparity separating a small fine from life imprisonment. *Mulaney v. Wilbur*, 421 U.S. 684, 700 (1975). The Court summarily rejected the rule "that any significant increase in a statutory mandatory sentence would trigger a constitutional 'elements' requirement" when analyzing sentencing factors. *Almendarez-Torres v. United States*, 523 U.S. at 246. Indeed, this Court held in *Barclay* "that it was permissible to consider the defendant's racial animus in determining whether he should be sentenced to death, surely the most severe 'enhancement' of all." *Wisconsin v. Mitchell*, 508 U.S. at

486. The Court's finding in *Almendarez-Torres* that recidivism is not a crime element because it is a traditional sentencing factor, is equally applicable to motive – also a traditional sentencing factor.

Jones v. United States, 526 U.S. 227 (1999) is not dispositive to the facts in this case. The structure of 18 U.S.C. § 2119, is such that the statute did not logically or grammatically present a complete offense in the absence of a reading of the entire text, which included the grading of penalties. Furthermore, injury severity is traditionally an element of an offense, while motive is not.

CONCLUSION

The New Jersey Supreme Court correctly held that the state's bias-motivated crime enhancement law is a constitutional exercise of legislative authority to properly designate an aggravating factor at sentencing. The state did not enact a new offense, nor did it relieve itself of the obligation to establish guilt beyond a reasonable doubt before a jury for existing underlying offenses. Motive is a traditional post trial sentencing factor that can be indispensable to the formulation of a just sentence after guilt has been determined. In summation – motive matters. As one commentator noted: "The effect of Kristallnacht on German Jews was greater than the sum of the damage to buildings and assaults on individual victims." James Weinstein, *First Amendment Challenges to Hate Crime Legislation*, 11 CRIM. JUST. ETHICS 10 (1992). Therefore, it is entirely permissible for a legislature to codify a particularly reprehensible motive, such as racial bias, into a

judicial sentencing factor rather than an offense element, if it so chooses without contravening the Fifth, Sixth or Fourteenth Amendments' protections relating to due process and jury trials. The decision of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

BRIAN LEVIN
Counsel of Record
California State University,
San Bernardino
5500 University Parkway
San Bernardino, CA 92407
Attorney for Amici Curiae